Supreme Court, U.S.
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No.

In the Supreme Court of the United States
October Term, 1996

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Robert J. Scallet, *Petitioner,*

*v.*

John R. Rosenblum, Clyde Ray Smith, Robert Harris,
*Respondents.*

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*PETITION FOR A WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SECOND CIRCUIT*

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# PETITION FOR WRIT OF CERTIORARI

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## Questions Presented

1. In a case involving the termination of a graduate school teacher for classroom speech concerning social and political issues,

a. should the legal standard be derived from the "government as educator" cases such as *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), as used in some circuits, or from *Pickering v. Board of Education*, 391 U.S. 563 (1968), applicable to the "government as employer," as used by courts in other circuits; and

b. may a court base a finding that speech on core issues of public concern became unprotected on the ground that the classroom presentation and the discussions engendered by it touched on issues allegedly different from those raised in other classes, thereby "disrupting" the graduate school's alleged interest in "tight control" over the political and social content of its curriculum?

2. Are administrators of a graduate school entitled to qualified immunity under the Civil Rights Act when they terminate an employee for classroom speech on core issues of public concern because discussion of particular political and social issues undermines their personal agendas?

3. Does the plaintiff in a Civil Rights Act case have the burden of proving on summary judgment that "but for" the protected speech he would not have been terminated?

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All parties appear in the caption of the case on the cover page.

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In the Supreme Court of the United States
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Robert J. Scallet, *Petitioner,*

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John R. Rosenblum, et al., *Respondents.*

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

In *Waters v. Churchill*, 511 U.S. 661, 671 (1994), this Court recognized that "the government as employer indeed has far broader powers than does the government as sovereign" to regulate speech, but failed to reach consensus on a "workable general rule" to govern these cases. And while the absence of a standard for ascertaining when a violation of the Civil Rights Act has occurred in free speech/retaliatory discharge cases is indeed "inconvenient" (*id.* at 670), that would be an understatement when describing the state of the law with respect to qualified immunity in these cases.

This case presents an excellent opportunity for the Court to end the jurisprudential anarchy in these related areas because the critical issues upon which guidance is needed appear in stark relief and there is a factual record to provide substance for the building blocks of definable standards. But perhaps more important, the case presents the issues in a context -- the extent to which officials at a public university

may control classroom speech on controversial social and political issues -- that has considerable significance of its own. It has been thirty years since this Court has discussed where our tradition of academic freedom intersects with the First Amendment in our universities, and it has *never* addressed how those principles apply to classroom speech in higher education. But as the rancor over political correctness on our campuses demonstrates, the classroom is precisely where the future of America's social and political discourse is being determined.

## Opinions Below

The opinion of the Court of Appeals appears in the Appendix at 1a and is unpublished. The District Court's opinion appears at App. 6a and is reported at 911 F. Supp. 999.

## Jurisdiction

The Court of Appeals decided the case on January 29, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

## Statutory Provisions

Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other

person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

## Statement of the Case

1. *The District Court's Opinion.* Petitioner was an instructor at the Darden School, the graduate school of business at the University of Virginia. At the time of his termination, he was the "Course Head" of the Analysis & Communication ("A & C") course at Darden which examined issues relating to business communication. It is undisputed that, both inside and outside the classroom, petitioner expressed strong views concerning racial and gender issues at Darden and in business communication generally. App. 7a. This made him extremely controversial at Darden, where any discussion of such issues was viewed as a threat by a small, but powerful faction of senior faculty members. Indeed, the conflicts were so severe that Darden appointed an outside panel to report on this issue. In a report issued the day after plaintiff's termination, that panel observed that the hostility of some faculty to discussions of these issues had led to "widely held perceptions by the faculty that . . . there is an inability (or an unwillingness) to address the underlying issues that diversity is creating. This has allowed particular problems to escalate to destructive proportions." App. 13a-14a.

The District Court found that there were threats delivered to petitioner about his speech on these issues throughout his tenure at Darden. For example, respondent Robert Harris, an Associate Dean at Darden, warned him that

his classroom discussions of social and political issues, including his use of two cases involving minorities as business decision makers, "disturbed" other faculty because it was "unsettling" to students. App. 11a. In the Fall of 1992, respondent Smith, another Associate Dean, ordered petitioner to remove from the wall outside his office various articles and cartoons dealing with social issues in communications because such views, if communicated to students, could be "dangerous." App. 13a.

In May, 1992, Harris told petitioner that he was renewing his contract, but that "[Smith] and the others want all the political and social content stripped from your course." App. 8a, 11a. Within hours, however, Smith summoned petitioner to his office, called him "dangerous" and "evil" because of "all the politics you do," including the use of "minority material," complained that petitioner was "undermining my agenda for the school," and then stated that he had been trying to get him fired for two years and "now I am going to do it." App. 11a-12a. Petitioner was fired a few days later.

The court began its legal analysis by noting that it was "axiomatic" that a public educational institution could not fire a teacher because of speech protected by the First Amendment. App. 20a. However, it expressed confusion about the legal standard to apply to classroom speech because of conflicts in the circuit courts: some courts use the standard developed for student expression in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), while others employ the standard for speech by public employees enunciated in *Pickering v. Board of Education*, 391 U.S. 563 (1968). App. 21a-22a. In resolving that debate in favor of the *Pickering* standard, the court reasoned that the government's "significant interests" in *Hazelwood* which allowed it to control the educational process to the possible

detriment of an individual's freedom of expression were "anathema to the intellectually maverick environments of the university and graduate school" where teachers are "charged with pushing the intellectual envelope." App. 26a.

Pursuant to that test, the court began with a discussion of whether respondent's speech was on issues of "public concern" within the meaning of the term enunciated in *Connick v. Myers*, 461 U.S. 138 (1983). This created little problem:

> [I]t appears unassailable that petitioner's advocacy of diversity, through the materials he taught in class, relate to matters of public concern. Debate is incessant over the role of diversity in higher education, employment and government contracting, just to name a few spheres.

Thus, the court concluded that petitioner's "classroom speech concerning diversity relates to a *core issue* of public concern" (emphasis supplied). App. 33a.

This brought the court to its analysis of whether plaintiff's speech had lost its protected status under *Pickering* because it was "disruptive." The court emphasized that the tradition of academic freedom in higher education and the fact that plaintiff's speech related to "core issues" of public concern meant that "the state must make a stronger showing of disruption in order to prevail." App. 36a. Nonetheless, the District Court found the necessary "disruption" by holding that Darden's interest in uniformity of instruction outweighed petitioner's right to discuss core issues of public concern. As the court explained, petitioner's speech "in the form of the materials he used and the discussion those materials fostered" was different from what others at Darden

were teaching and thus threatened Darden's need for "tight control" of the social and political content of its curriculum. App. 37a.

The court's conclusion that petitioner's classroom speech was "disruptive" became even more critical when it considered petitioner's speech on the same subjects in other locales. For here the court acknowledged that petitioner's speech about diversity during faculty meetings (App. 40a-43a) and through his posting of various articles and cartoons on his wall was protected under *Pickering*. App. 43a-44a.

With respect to summary judgment standards, the court acknowledged that there were disputes concerning respondents' motivation, including the explicit threat by Smith to fire petitioner because of "all the politics you do" and an admission by Rosenblum that Smith's hostility to petitioner's speech had been the reason for the termination. And while conceding that these and the other incidents cited by petitioner provided "some evidence of illegal motivation," it nonetheless parsed the statements made by respondents and concluded that they had actually been directed at petitioner's unprotected classroom speech and not his protected speech outside the classroom. App. 45a-46a.

2. *The Court of Appeals Decision.* The Court of Appeals decision is a bare-bones affirmance of the District Court. The court acknowledged that petitioner was outspoken about social and political issues and that his speech related to matters of public concern. App. 1a. It noted the District Court's conclusion that that speech was nonetheless not protected because it was "disruptive" of Darden's interest in controlling curriculum, but did not express an opinion on that issue. App. 2a. Nor did it consider whether that speech, or petitioner's other speech, was a "substantial factor" in the termination. Rather, it merely stated that petitioner had not met his burden to

establish that protected speech was the "but for" cause of the termination because there was evidence of complaints against petitioner that would justify removal. App. 3a. With respect to qualified immunity, the court, again without discussion, held that "only infrequently" will an official in a free speech case lose qualified immunity because the *Pickering* test is "subtle," and clearly beyond the expertise of "three business school professors and administrators not trained in the law." App. 5a.

## Reasons for Granting the Writ

### I.

### THE LOWER COURTS' ANALYSIS FAILS TO STRIKE THE PROPER BALANCE BETWEEN AN INDIVIDUAL TEACHER'S RIGHT TO DISCUSS CORE ISSUES OF PUBLIC CONCERN AND THE GOVERNMENT EMPLOYER'S INTERESTS IN EFFICIENCY.

The District Court noted that it had been "called upon to strike a difficult balance between important, competing interests," (App. 36a) and that its task was made more difficult by the fact that "the Supreme Court . . . has never spoken on the level of First Amendment protection afforded teachers' in-class speech." App. 21a. And while petitioner agrees with the District Court's decision to follow the *Pickering* line of cases, he believes that the court foundered on the very issue that this Court found so difficult in *Waters:* just how does one evaluate a defendant's conduct in light of the government's interests in "efficiency?"

A

*The Search for a Standard: Academic Freedom and the First Amendment*

For more than thirty years, the Supreme Court has recognized that the freedom of speech in education is a "transcendent value [that is] a special concern of the First Amendment." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). In the intervening years since that case, the lower courts have struggled with the legal standard to apply to classroom speech. Paramount to the conflict has been the fundamental question whether the appropriate context is the "government as educator" versus the "government as employer."

Respondents argued for the former construct and asserted that an educational institution has *exclusive* control over what is taught in a university classroom -- that a public university *owns* the First Amendment right "to determine for itself . . . who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Widmar v. Vincent*, 454 U.S. 263, 276 (1981).[1] And while the lower courts adopting that standard rarely take the position that the government as educator has rights over classroom content to

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[1] Respondents also argued that petitioner had no First Amendment interest in his classroom speech because it was his job to speak in that forum. They cited case law in the Fourth and Sixth Circuits holding that "speech as an employee" as opposed to "speech as a citizen" is not protected. *See DiMeglio v. Haines*, 45 F.3d 790, 805 (4th Cir. 1995); *Action Distributing v. Teamsters Local 1038*, 977 F.2d 1021 (6th Cir. 1992). However, this position conflicts with cases within the Fourth Circuit (*see Bishop v. City of Suffolk*, 1996 U.S. App. LEXIS 13137 (4th Cir. 1996)) and elsewhere (*see Kincade v. City of Blue Springs, Mo.*, 64 F.3d 389, 396-97 (8th Cir. 1995)).

the exclusion of the individual teacher's rights, their interpretation of this Court's standard in *Hazelwood* leaves very little, if any, room for the teacher. *See, generally, Silano v. Sag Harbor Union Fire School District Board*, 42 F.3d 719, 722 (2d Cir. 1994), *cert. den.*, 115 S. Ct. 2612 (1995) (school board has exclusive right to determine curriculum); *Miles v. Denver Public Schools*, 944 F.2d 773, 777 (10th Cir. 1991) (rejecting *Pickering* because "it does not address the significant interests of the state as educator.")

In conflict are decisions applying the *Pickering* standard to classroom speech. *See, e.g., Blum v. Schlegel*, 18 F.3d 1005 (2d Cir. 1994); *Dambrot v. Central Michigan University, 55 F.3d 1177 (6th Cir. 1995).* These cases acknowledge the interests of the educational institution, but do so within the *Pickering* framework.

The Court should resolve this conflict over the governing standard by clarifying that, at least in the case of higher education, the *Pickering* standard should control. The factors that give the government as educator considerable leeway in the courts -- the need to teach children accepted cultural and moral values or the deference owed to elected school boards to determine educational content -- are inapposite in higher education cases. As Chief Justice Rehnquist has observed, "the government as educator is subject to fewer strictures when operating an elementary and secondary school system than when operating an institution of higher learning." *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 920 (1982) (Rehnquist, J., dissenting).

Indeed, the roles of the institution versus the teacher with respect to educational content are much different on the university level. Virtually all universities, including the University of Virginia, subscribe to the *1940 Statement of Principles on Academic Freedom and Tenure*, which

provide, among other things, that "[t]eachers are entitled to freedom in the classroom in discussing their subject . . ."[2] While there may be differences between "free speech" and "academic freedom," "[t]he analysis of what constitutes a matter of public concern and what raises academic freedom concerns is of essentially the same character." *Dambrot v. Central Michigan University, supra,* 55 F.3d at 1188. And perhaps more to the point of the contemporary academic scene, classroom speech "is the crux of the conflict between political correctness and the Constitution." Lassen, *Political Correctness Askew: Excesses in the Pursuit of Minds and Manners*, 63 Tenn. L. Rev. 689, 696 (1996).

B

*Who Decides: The Distinction Between Fact and Law*

Setting the correct balance between institution and faculty from among the conflicting precedents, however, is only the start of the clarification needed in this area. Arguably as fundamental is setting the correct balance between the respective roles of the court and the jury.

It is clear that the determination of whether speech is on a matter of "public concern" is a mixed question of fact and law. The second determination in the *Pickering* test -- whether the government employer's efficiency interests outweigh the interests of the employee -- is particularly fact-dependent because it requires an understanding of those former interests in the context of the particular case. As one

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[2] The *Principles* are promulgated by the American Association of University Professors, which filed an *amicus curiae* brief in the court of appeals strongly supporting petitioner. The Court of Appeals ignored the brief and the issue.

court put it, since the *Pickering* standard requires a consideration of "a *variety* of factors as revealed by *specific* facts," it is an issue for the trier of fact. *See Constantine v. Board of County Commissioners*, 910 F.2d 695, 701 (10th Cir. 1990) (emphasis in original); *Johnson v. Multonomah County, Oregon*, 48 F.3d 420 (9th Cir.), *cert. den.*, 115 S. Ct. 2616 (1995).

Other courts, however, have assumed that it is their responsibility to make a "legal determination," even where the facts are in conflict. The District Court took that position for it frankly admitted that the issue depended on "a factual resolution" and that the record was mixed on the issue. Nevertheless, it proceeded to resolve those conflicts and make factual findings that caused petitioner's protected speech on "core issues" of public concern to become unprotected "disruptive" speech.

Petitioner urges the Court to end this fundamental conflict by stating that the second prong of the *Pickering* balance requires a *factual* determination. There will always be cases where there is no genuine issue of material fact, or where, on the facts admitted by the parties, there is no doubt about the disruptiveness of the speech, but there is nothing in the language of the Civil Rights Act or the First Amendment that supersedes the rule that courts decide law and juries decide facts.

Indeed, this case illustrates the danger of judicial arrogation of the fact-finding role. For the premise of the District Court's finding of "disruptiveness" -- that petitioner was not teaching the approved curriculum -- is plain wrong.

First, it is not clear what the District Court meant by "curriculum"; especially in light of its conclusion that the "discussions [the course] materials fostered" in petitioner's classroom were "inconsistent" with some "approved curriculum." Darden utilizes the Socratic method of

instruction where course objectives are achieved through student-teacher interaction. It is difficult to see how or why an institution would "approve" classroom discussion beforehand, much less *ban* any mention of political and social issues.

But even if the District Court's finding were restricted to the case materials used in the A & C course, Darden, like most institutions of higher education, has well-defined procedures for developing and approving curriculum, and like most institutions, those choices are, in the words of respondent Rosenblum in his deposition, "the property of the faculty as a whole." As the District Court acknowledged, petitioner was institutionally responsible for the development of that curriculum (App. 7a), and it, including the inclusion of cases that, among other things, allowed the students to consider how contemporary social and political issues affect business communications, had been approved by the full faculty just before his termination (with petitioner "spending countless hours collaborating on curriculum design" with the chairman of the faculty committee institutionally responsible for curriculum in that process). App. 61a-62a.

One of the primary reasons the District Court went astray was that none of the parties had discussed this issue in any detail. As the District Court acknowledged, respondents had always justified the termination by saying that speech had nothing to do with it, or that petitioner had *no* First Amendment rights in classroom speech. App. 35a, n. 16. They had never claimed that the student discussions or case materials in petitioner's classroom were inconsistent with the approved curriculum. Rather, the only explanation in the record concerning respondents' motivation was Smith's complaint that such discussions "were undermining *my* objectives for the school." App. 12a. The transformation of

a personal political agenda into some institutional judgment on curriculum was strictly a creation of the District Court.[3]

That leads to what should be the first component of any factual standard to determine when an employer's efficiency interests justify retaliation against protected speech. Put simply, that determination must be based on an evaluation of the *employer's* judgment. A court is much less likely to make fundamental errors of fact on this issue if it is reviewing the employer's determination of disruption than it is if it makes this judgment on its own. *See generally, Eberhardt v. O'Malley*, 17 F.3d 1023, 1026 (7th Cir. 1994) (employer, not court, must supply reason for why public concern speech is not protected). And that should be particularly important in an area such as the curriculum in an institution of higher education: to put it bluntly, the District Court's foray into pedagogical theory fully reflects its amateur status.[4]

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[3] The District Court's attribution of its "disruption" theory to respondents is a disingenuous description of the court's stringing together of stray comments in the record, some of which are carefully edited to fit the District Court's theory. For example, the court twice quotes Rosenblum's admission that "[t]here were a few faculty who did not like [Scallet's] activist orientation to the course," but both times leaves off the end of that statement, "but this had no bearing on the decision to terminate."

[4] For example, the court characterizes as "most significant" to its decision the assertion that petitioner's classroom discussions "trenched" on other courses. And while there were one or two complaints about that, "trenching" is more properly termed "course integration" at Darden. At least that was how the faculty committee in charge of curriculum expressed its goal, and why petitioner was asked by that committee chairman "to plan and implement several new multi-course program events." App. 62a. The fact is that the District Court was expressing its *own* misgivings about "the wisdom of teaching 'diversity' in a speech and writing class," which is clear throughout its opinion. *See* App. 34a, n. 15; 43a, n. 21. Perhaps if the court had stopped to think that graduate schools do not often teach remedial

Where, as here, defendants make no effort to balance an employee's speech against the government's interests, one could argue that liability should be presumed. That is certainly one reading of the plurality's opinion in *Waters*, which Justice Scalia characterizes as creating a First Amendment procedural right in free speech cases. 511 U.S. at 685. Or, as the Court noted in a slightly different context in *Pico*, the government's argument justifying control of speech is entitled to deference only "if the record demonstrate[s] that [it] had employed established, regular, and facially unbiased procedures for the review of controversial materials." 457 U.S. at 874.

But even if the government defendant is allowed to offer post-termination justification for its actions, it must do so in a manner that recognizes the "context in which the dispute arose." *Rankin v. McPherson*, 483 U.S. 378, 385 (1987) (citations omitted). There is an obvious difference between the "efficiency interests" of a graduate school versus a police department. *See, e.g., Jurgensen v. Fairfax County, Va.*, 745 F.2d 868, 880 (4th Cir. 1984). A police department depends, at least in part, on discipline and close working relationships among officers who place their lives in the hands of their partners every day. By contrast, higher education is by its very nature a messy business where individual scholarship is prized and faculty dispute over ideas is strongly encouraged.

It is not clear how the judge who expressed misgivings about whether the *Pickering* standard gave enough weight to a teacher's obligation to "push[] the intellectual envelope . . . in the intellectually maverick

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writing, it would have at least considered the lengthy written and oral explanations in the record of how and why the A & C curriculum explored social and political issues in business communications.

environments of the university and graduate school" (App. 25a) became the judge who sanctioned such "tight control" over the curriculum that it found it essential that administrators be given the unilateral authority to *ban* discussion of social and political issues. But inconsistencies aside, the real danger in the District Court's opinion is its paean to "uniformity" of classroom presentation and the overarching need to avoid intellectual "divisions within the faculty." To be sure, there can be classroom speech that "materially and substantially interfere[s] with the requirement of appropriate discipline on the operation of the school." *Tinker v. Des Moines Independent Community School District,* 393 U. S. 503, 509 (1969). But there is no suggestion here that petitioner was not doing his job, much less advocating disruption of Darden's educational mission in the classroom;[5] rather, his speech was controversial because he dared to discuss political and social ideas that a few powerful people at Darden -- those who, in the words of the outside panel report, felt that the "Darden way of proceeding was being lost" -- simply did not want discussed.

When a court sanctions retaliation against the political and social content of speech because of its

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[5] On the contrary, it is undisputed that petitioner was an extremely successful classroom teacher: a few weeks before his firing, a letter signed by more than 125 of the 250 students in the first year class at Darden urging that plaintiff be awarded a major teaching prize stated that he "is unparalleled in his ability to communicate and instill in students the desire to make learning a fundamental part of their lives." App. 58a. And as for the effect of his speech on relations at the school, the letter stated (App. 59a):

> The most important contribution [that appellant] makes to Darden is what he does to foster better relations and a stronger sense of community at Darden . . . [Appellant] may be the glue that holds Darden together.

preference for conformity in intellectual discourse, it becomes a participant in the dubious cause of political correctness and an accomplice in the violation of our Constitution. If the First Amendment is to mean anything in our universities, it must mean that an individual teacher has a right to take a different position from the next person.

## II.

## THERE IS NO STANDARD FOR QUALIFIED IMMUNITY IN FREE SPEECH/RETALIATORY DISCHARGE CASES.

The problems besetting qualified immunity in free speech cases are similar to, but far more severe than, those discussed above. There is no recognizable legal standard and splits between and within virtually every circuit. It is time for the Court to write the final chapter in the progression from *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), to *Anderson v. Creighton*, 483 U.S. 635 (1987), to *Johnson v. Jones*, __ U.S. __, 115 S. Ct. 2151 (1995).

### A

### *The Lower Court Morass*

A sampling of the case law on the most basic questions of judicial procedure is all it takes to demonstrate the desperate straits of qualified immunity in the courts. Take burden of proof, for example. *Compare Benigni v. City of Hemet*, 879 F.2d 473, 479 (9th Cir. 1988) (holding that defendant has the burden and citing cases from four other circuits supporting that view) *with Pallottino v. City of Rio Rancho*, 31 F.3d 1023 (10th Cir. 1994) and *Spivey v. Elliott*,

29 F.3d 1522 (11th Cir. 1994) (both holding that the plaintiff bears the burden). Who resolves factual disputes with respect to qualified immunity? *Compare Lampkin v. City of Nacogdoches*, 7 F.3d 430 (5th Cir. 1993), *cert. den.*, 114 S. Ct. 1400 (1994), and *Ansley v. Heinrich*, 925 F.2d 1339 (11th Cir. 1991) (qualified immunity is a question of law to be decided by the court) *with Johnston v. City of Houston*, 14 F.3d 1056 (5th Cir. 1994) and *Gooden v. Howard County, Maryland*, 917 F.2d 1355 (4th Cir. 1990) (qualified immunity is a question of fact to be decided by the jury) *with Kim v. Coppin State College*, 662 F.2d 1055 (4th Cir. 1981) (qualified immunity should be decided by the court *after* the jury decides the underlying facts.).

Not surprisingly, this confusion extends to the legal standard applicable to qualified immunity. On the one hand, there is the line of cases similar to the decision of the Court of Appeals here. Reasoning that the balancing test required in *Pickering* is inherently difficult, the court held that "only infrequently" will a plaintiff's rights be "clearly established" -- after all, how could "three business school professors and administrators not trained in the law" possibly know all the "contours of [petitioner's First Amendment] rights?" App. 5a. *See also DiMeglio v. Haines*, 45 F.3d 790 (4th Cir. 1995); *Myers v. Morris*, 810 F.2d 1437 (8th Cir.), *cert. den.*, 484 U.S. 828 (1987); *Benson v. Allphin*, 786 F.2d 268 (7th Cir.), *cert. den.*, 479 U.S. 848 (1986). Then there are the cases that either assume that an employee's right to freedom of speech has been "clearly established" by now or simply employ legal reasoning like one finds in *Cromer v. Brown*, 88 F.3d 1315, 1326 (4th Cir. 1996), where the court repeats that "only infrequently" will free speech rights be "clearly established," and then holds that not only is this one of those "infrequent" cases, but then cites eight cases from eight

circuits in the preceding several years also denying qualified immunity.

B

*A Proposed Standard for Qualified Immunity*

Much of this chaos can be traced to the lower courts' failure to understand the distinction between *Harlow* and *Creighton*. The former involved qualified immunity as a matter of law: whether the right alleged was itself "clearly established." But the latter, in emphasizing that immunity can also be based on the "objective reasonableness" of the actual conduct of the defendant, added another opportunity for government officials to establish immunity from personal liability: what the Court most recently in *Johnson* termed "fact-based qualified immunity."

With respect to qualified immunity as a matter of law, there have probably been over one thousand free speech/retaliatory discharge cases since *Pickering* and perhaps five hundred since the Court stated in *Rankin* that "[i]t is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." 483 U.S. at 383. It is time for this Court to state unequivocally that, at least with respect to free speech/retaliatory discharge cases, the right is "clearly established" as a matter of law.

Indeed, once one starts from the premise that the government in these cases is acting as employer, the policy underpinning of any immunity at all becomes problematical. The corollary of the plurality's observation in *Waters* that the government as employer must have more leeway to suppress speech than when it acts as sovereign is that the defendant in such cases should be treated more like an employer than the

sovereign. Yet, no one would even think of arguing in an employment case that the defendant should be excused from liability because the "contours of the law" are unclear -- though that is at least as true with respect to the many laws constraining private employers as it is with respect to the First Amendment. Indeed, "ignorance of the law is no defense" did not become a cliche by accident.[6]

Nevertheless, petitioner does not believe that the government employer should be subject to damages for every violation of an employee's First Amendment right. He has no argument with the notion that the courts should be able to vindicate a Constitutional right by affording injunctive or other relief while protecting the government official from personal liability because there will always be instances where it does not seem "right" to punish the conscientious government official for making the "wrong" legal determination.

But immunity must be earned: it is important for this Court to require that the government employer allege and explain the *facts* that prove the "objective reasonableness of his conduct." And like all fact-based affirmative defenses, the qualified immunity defense can be determined by the court on summary judgment only if there is no genuine dispute as to any material facts; otherwise, it should be determined by the jury pursuant to instructions from the court on the factors to be considered.

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[6] The other policy underpinning of qualified immunity -- saving the official from the rigors of standing trial -- was treated rather roughly in *Jones*. 115 S. Ct. at 2158. Indeed, when (at least as this is being written) there is legitimate debate about whether the President of the United States has immunity from a civil trial, it seems preposterous to argue that the work of the Darden School cannot go on if three of their teachers and administrators have to defend their conduct in court.

Beyond setting the respective roles of judge and jury, it is important that this Court provide guidelines for the lower courts. Petitioner suggests the following to replace the content-less reasoning that passes for legal standards in far too many cases.[7]

The first factor bearing on the qualified immunity defense is that the government official has actually made some effort to engage in a balancing of the employee's rights. This is the common-sense teaching of *Waters*: while employers "can spend only so much of their time on any one employment decision," our Constitution requires them to give *some* thought to the issue. 511 S. Ct. at 679. *See also Pico, supra*, 457 U.S. at 871, where the Court held that the absence of a good faith procedure indicated that defendants acted with "personal bias." A defendant should not be able to claim qualified immunity on the basis that the *Pickering* balancing is difficult if he makes no effort to do that balancing at all.

Second, the court should take into account the difficulty of the *Pickering* balance. There will always be

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[7] At a minimum, the Court should put an end to the "only infrequently" "standard" of qualified immunity, particularly where, as in the case at bar, it is used as an excuse not to engage in any analysis at all. Even if the premise of the courts' "reasoning" were factually correct and cases denying immunity were actually rare -- on the contrary, there are at least as many cases denying immunity as there are granting it -- frequency of predicted result does not make a legal standard: the burden of proof in criminal cases is not "beyond a reasonable doubt" because the defendant seldom wins.

Similarly unhelpful is the "standard" based on a search for cases with similar facts. The absence of such cases should not be dispositive; as Judge Posner pointed out in *Eberhardt, supra*, 17 F.3d at 1028, the lack of prior cases may be attributable to "nothing more than wide-spread compliance with well-recognized constitutional principles."

cases where the speech is difficult to assess (*see, e.g., Jeffries v. Harleston*, 52 F.3d 9 (2d Cir. 1995) (racist speech)), or there is a conflict between two Constitutional provisions (*see, e.g., Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991), *cert. den.*, 505 U.S. 1218 (1992) (teacher expressing personal religious beliefs in gym class)), and the appropriate judicial response may well be a nuanced remedy such as protection of the speech with injunctive relief and immunity from damages. But, the burden should be firmly placed on the defendant to justify any retaliation against protected speech -- in no case should the alleged difficulty of the *Pickering* balance be dispositive.

Third, the degree to which the official's conduct is consistent with the policies of the employer should be considered. For example, where, as here, the policy of the institution -- indeed one of its principal values -- is academic freedom and the free expression of ideas in the classroom, it is absurd to suggest that the administrator does not know that it is "wrong" to retaliate against the political content of speech with which he disagrees. As expert testimony in this case establishes, the consensus position in academia is that "[s]anctions, including non-renewal and suspension from the classroom, imposed on a teacher in response to his exercise of academic freedom are unacceptable." App. 76a.

Fourth, there is a range of possible responses to speech, and the reasonableness of the official's choice should be significant. For example, educators often make good faith attempts to protect controversial speech by issuing warnings or providing written guidelines, and even where such attempts are themselves considered to be violative of the First Amendment, it does not seem appropriate to expose educators to personal damages. *See, e.g., Cohen v. San Bernardino College*, 92 F.3d 968 (9th Cir. 1996), *cert. den.*, 65 U.S.L.W. 3631 (1997) (holding that teacher cannot be

subject to guidelines to control use of allegedly obscene materials in class, but granting college administrators qualified immunity for efforts to deal with the problem). Thus, in the context of this case, if the content of petitioner's classroom speech on "core issues" of public concern were in fact inconsistent with the approved curriculum, the proper response would be to attempt a resolution. At a minimum, one would expect to see notice of that conflict. But where, as here, officials react to controversial speech by terminating the teacher without any "notice of what classroom conduct is prohibited" their liability should be clear. *See Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993); *Mailloux v. Kiley*, 448 F.2d 1242, 1243 (1st Cir. 1971).

This Court would no doubt have different ideas on the elements that would demonstrate the "objective reasonableness" of a government official's conduct in free speech cases. Indeed, petitioner is considerably less concerned with the details of a standard -- given the factual record here, respondents would not be entitled to qualified immunity under virtually any standard one could devise -- than he is that this Court provide some guidance to end the kind of arbitrary decision-making one sees over and over again in the case law. Certainly nothing suggests that the lower courts are going to miraculously arrive at a coherent standard on their own.

## III.

## THE COURT OF APPEALS' SUMMARY JUDGMENT ANALYSIS IS BASED ON A LEGAL FRAMEWORK THAT CONFLICTS WITH CASES FROM EVERY OTHER CIRCUIT.

In *Waters*, this Court elucidated the framework for determining whether summary judgment may be granted in free speech cases. After holding that defendants there had established a reason for termination based upon what they believed to be insubordinate speech, the Court cautioned that that did not mean that they were entitled to summary judgment. On the contrary, plaintiff's prior protected speech, defendants' "sensitivity" to the issue in the past and some evidence of "hostility" towards plaintiff were sufficient to create "a material issue of disputed fact about petitioner's actual motivation." 511 S. Ct. at 681.

The evidence in the record of this case goes far beyond that proffered by the plaintiff in *Waters*. There are prototypical predicate acts, such as the removal of articles and newspaper cartoons from petitioner's wall because of their political content, an explicit warning from Harris that "[Smith] and the others want you to strip the political and social content from your class," a direct threat from Smith that "I have been trying to get you fired for two years" because of "all the politics you do," "and I am going to do it now," and an admission after the fact by Rosenblum that political disagreement with petitioner's speech was the cause for the termination. App. 11a-13a. And all of this took place at a time when, according to the outside committee appointed to study diversity at Darden, there was a "hostile climate" at Darden caused by the resistance of a small group of senior

faculty to changes in the "Darden way of proceeding" resulting from diversity. App. 50a-52a.

The District Court assumed that petitioner's speech had been the cause of the termination, but decided that only some of that speech -- that occurring outside the classroom -- was protected. It made no effort to determine how much of the classroom speech was protected and how much unprotected because of alleged straying from the curriculum, but apparently merely assumed that *any* discussion of political or social issues was "disruptive." However, it did claim to be able to sub-divide respondents' motivation, assigning most of it to the unprotected speech and less of it to the protected speech. And while that is precisely the kind of nuanced factual determination that the Court emphasized in *Waters* ... for the fact finder to sort through, at least the District Court followed the framework that has been established for summary judgment in free speech cases.

The same cannot be said for the Court of Appeals. It never even made a determination whether protected speech was a substantial factor in the termination, but rather based its decision on a construction that, as far as petitioner has been able to determine, is unique to the Fourth Circuit. Specifically, that circuit believes that summary judgment can be granted when the defendant presents evidence of a non-speech cause for the termination because, under what it calls "but for causation," the plaintiff must demonstrate that there is no such other cause. As the court explained its rule in *Huang v. Board of Governors*, 902 F.2d 1134, 1140 (4th Cir. 1990), "it is not enough that the protected expression played a role or was a motivating factor in the relationship" because a plaintiff must also show that "but for" the expression "the employer would not have taken the alleged retaliatory action."

As this Court has repeatedly made clear, the plaintiff has met his burden when he "has shown that his constitutionally protected conduct played a 'substantial' role in the employer's decision not to rehire him . . ." *Givhan v. Western Consolidated School District, supra,* 439 U.S. 410, 416 (citing *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287 (1977)). The burden then *shifts to the employer* to prove that it would have made that decision anyway, and if it fails, then the result is a finding that the protected conduct was the "but for" cause of the termination. *Id.* But, as the Supreme Court made clear in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 248-249 (1989), the shifting of the burden in a *Mt. Healthy* case shows that the plaintiff is *not* required to prove all elements of the "but for" inquiry; on the contrary, the Court noted that it had "never" required a plaintiff to prove the negative proposition that, absent the protected activity, he would not have been terminated.

Indeed, the Fourth Circuit's "but for" rule is not only inconsistent with the accepted framework in other courts, it also focusses on an aspect of the factual record that is irrelevant to summary judgment under the reasoning of *Waters*. A defendant cannot do any better than the hospital administrators in *Waters* who were found by this Court to have a legitimate reason for termination based on their version of what the employee had said. But, as noted, that cannot be dispositive; as Justice Scalia pointed out, at least in the case of an at-will employee, the government employer *always* has a legitimate reason for termination since it can do so for no reason at all. 511 S. Ct. at 691. Thus, once an employee produces evidence creating a genuine issue of material fact whether protected activity was a substantial factor in the termination, summary judgment must be denied whatever the reason offered by the employer.

Nevertheless, despite its irrelevance, petitioner cannot close without commenting on the Court of Appeals' fact-finding. He does not mean its acceptance of the petty complaints from a handful of part-time staffers at Darden as the basis for the termination of one of Darden's best teachers, or the fact that virtually all of these complaints came to light after petitioner was fired. The District Court fairly summarized some of the evidence in the record (and the appendix hereto) establishing pretext, including petitioner's success as a teacher (App. 58a-60a), his "demonstrated collegial disposition with other faculty" (App. 61a-63a; 65a), the marginal status of the part-timers (most of whom literally worked as little as three hours per week) (App. 62a-63a; 65a-66a), the part-timers' lack of professionalism (leading petitioner's successor to testify that they "had no sense of reasonable faculty behavior") (App. 66a), the lack of documentation of any criticism of petitioner in his personnel file, and the fact that petitioner's contract was renewed just before Smith threatened to fire him for his speech. Petitioner can assure this Court that none of these facts disappeared when the record was transmitted to the Court of Appeals.[8]

Rather, petitioner must respond to the Court of Appeals' cavalier sanctioning of respondent's allegation that petitioner engaged in "conduct bordering on sexual harassment." Of course, the court neither defined what that phrase meant, nor bothered to refer to any actual events that might have supported such a charge. The District Court had

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[8] Petitioner also refers the Court to the Expert Report of Peter Steiner who carefully examined the same record as the Court of Appeals from the perspective of a long-time administrator in higher education and concluded that there were numerous assertions in respondents' story that were inconsistent with the reality of how educational institutions are administered. *See* App. 68a-88a.

noted, in its recitation of what it characterized as "Disputed Facts," two incidents: one involving a woman who was allegedly "castigated" by petitioner for missing a class (three and one-half years before the termination), and another consisting of a "heated confrontation" with another part-timer for going behind his back to complain about a hiring decision (which also occurred more than a year before the termination). Neither incident, of course, even if true, "border[s] on sexual harassment" or is even in the general vicinity of "sexual harassment."

In discovery after the litigation was filed, petitioner for the first time learned that a Darden faculty member had passed along two complaints of conduct that might be construed as indicative of sexual harassment. This is the complete record of those complaints. On March 27, 1992, Melissa Birch wrote to Rosenblum and described the two incidents (App. 92a):

> In the first case, a female student reported to me that her A&C instructor, Mr. Cid Scallet, took off his shoes in class, stood on the table, and shouted obscenities. The student was upset by the behavior, disliked the experience and thought it was a waste of her time and money. In the second case, a female working in the building disclosed to me that she has been subjected to repeated and graphic descriptions of Mr. Scallet's sex life by Mr. Scallet himself.

This is the complete record of the "investigation" of those "charges." Both Rosenblum and Harris testified that they rejected the second charge out of hand because it was inconsistent with petitioner's character and reputation. With

respect to the alleged classroom incident, on April 24, 1992, Rosenblum wrote to Birch, professed to be "committed to addressing your complaint," and asked, "Could you provide us with the day and class in which the alleged behavior took place?" App. 93a. The following is the conclusion of the "investigation." On May 1, 1992, Ms. Birch wrote back to say that

> I wish to be clear that I have filed no complaint with your office and have not made any allegations. I did, on March 25, repeat to you information which had been told to me. I have not been told anything further by these individuals.

The Court of Appeals found that petitioner was fired a few days later because respondents had heard complaints of conduct bordering on sexual harassment.[9]

Respondents argued in the courts below that it was "ironic" that petitioner, who was widely respected by women students, faculty and staff at Darden for his sensitivity to their concerns (App. 59a-60a; 65a). was the subject of these "serious" charges. But petitioner knows that persons who hold strong positions on the "right" are not the only people who can be victimized by after-the-fact charges of sexual misconduct. On the contrary, such charges have become the favorite weapons of those who lack the courage to engage in an honest debate over ideas, whatever their position on the political spectrum.

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[9] Professor Steiner's comment was a bit different: "[R]eliance on these incidents to justify non-renewal and suspension would, acting within the standards of the academic community, be inappropriate, indeed outrageous, and suspiciously pretextual." App. 85a.

## Conclusion

Concurring in *California Division of Labor Standards v. Dillingham Construction N.A., Inc.*, 117 S. Ct. 832 (1997), Justices Scalia and Ginsburg recently observed that the number of cases in the area of law involved there suggested that the Court's prior decisions had "not succeeded [in fulfilling] our function of clarifying the law." Even worse, the lower courts were using language from earlier cases as an interpretative crutch that was preventing a reasoned analysis of the issues that did not reflect the evolution of the Court's thinking in the area.

Something similar has happened in the area of free speech and qualified immunity. The Court's reasoning from an earlier time has simply not been up to the task of providing an analytical foundation sturdy enough to support the sheer mass of cases. And now that the Court has expanded the reach of the First Amendment to independent contractors and political patronage, and is currently considering whether to expand qualified immunity to the private sector, the strain on the law's foundation can only increase. Now is the time to rebuild that foundation, and this is the right case with which to do it.

Respectfully submitted,

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# APPENDIX

ROBERT J. SCALLET, Plaintiff-Appellant,
v.
JOHN ROSENBLUM; CLYDE RAY SMITH; ROBERT HARRIS, Defendants-Appellees, and THOMAS JACKSON; DANIEL HALLAHAN; JOHN CASTEEN; JOHN BUCKMAN; RECTOR AND BOARD OF VISITORS OF THE UNIVERSITY OF VIRGINIA, Defendants.

No. 96-1138

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

January 29, 1997, Decided.

PER CURIAM:

Robert J. Scallet, a former writing instructor at the Darden Graduate School of Business Administration of the University of Virginia, appeals an order of the district court granting summary judgment in favor of Appellees, the dean and two associate deans at Darden, on his claim that his contract was not renewed in order to suppress his exercise of the right of free speech under the First Amendment. We affirm.

I.

Scallet was a non-tenured instructor in Darden's analysis and communications course ("A&C"), a required writing and public speaking course for all first-year business students. While Scallet taught at Darden, it is undisputed that he was a strong advocate of diversity both in and out of the

classroom. From 1988 until the spring of 1991, Scallet served as "course head" for the A&C department. However, in response to a number of complaints lodged against Scallet describing his confrontational style and strained working relationships with other members of the writing faculty, he was removed from the course head position but remained on the faculty as a writing instructor. Following this decision, Appellees continued to receive complaints about Scallet's lack of collegiality, the environment of fear and distrust he created which led to disruptions in the department, and other conduct which the district court characterized as bordering on sexual harassment.

Appellees met with all of the members of the writing faculty prior to deciding whether to renew Scallet's contract for the 1992-93 year. At this meeting, the faculty members collectively expressed concerns about their ability to continue working with Scallet. Allegedly as a result of these concerns and the numerous prior complaints, Appellees decided not to renew Scallet's contract.

Scallet commenced this action in district court under 42 U.S.C. § 1983. Following discovery, and after extensive briefing and argument, the district court entered summary judgment for Defendants/ Appellees on Scallet's First Amendment claim, which is the only issue on appeal.

Applying the balancing test of *Pickering v. Board of Educ.*, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968), the district court found that Scallet's in-class advocacy of diversity through the materials he taught in class related to matters of public concern. However, the court concluded that it was not protected by the First Amendment because it was disruptive, and because the Darden

administration's interest in controlling its curriculum outweighed Scallet's interest in his classroom speech. To the extent that Scallet engaged in any clearly protected speech, such as posting news clippings and cartoons around his office door and speaking out in faculty meetings, the district court found that such speech was not the "but for" cause of the non-renewal of his contract "in light of the compelling and substantial evidence of Scallet's misconduct and inability to work with his colleagues in the A&C Department." *Scallet v. Rosenblum* , 911 F. Supp. 999, 1019 (W.D. Va. 1996).

II.

The record is clear that the speech which Scallet contends is protected was not the cause of Appellees' failure to renew his contract. Specifically, answers to interrogatories and depositions of faculty members establish that numerous complaints were made to each Appellee during the years leading up to the non-renewal decision. These complaints described a confrontational style that made the other writing teachers feel physically and emotionally threatened, and that in some cases did, as the district court said, border on sexual harassment. The record reveals that some of these complaints led to Scallet's removal from the course head position a year before the nonrenewal decision. After his demotion, faculty members continued to complain about the same conduct and Appellees personally observed strained relationships in the writing department. Based on the numerous complaints and personal observations, Appellees made the decision not to renew Scallet's contract.

We agree with the district court that Scallet has failed to raise genuine issues as to the actual reason for his

non-renewal which require resolution by the trier of fact. A reasonable juror could not find that Appellees retaliated against Scallet for his in-class speech, his advocacy in faculty meetings, or because of the posted articles and cartoons outside his office.

III.

Assuming, arguendo, that Scallet's interest in some academic speech was constitutionally protected, Appellees are still entitled to summary judgment on the basis of qualified immunity. Government officials are immune from Section 1983 liability for money damages as long as "their conduct does . . . violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 817-19, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). The district court recognized that "the Supreme Court . . . has never spoken to the level of First Amendment protection afforded teachers' in-class speech," and indicated that it was "called upon in this case to strike a difficult balance between important, competing interests." *Scallet* , 911 F. Supp. at 1009, 1015.

It is evident that the parameters of the protection afforded to a university professor's academic speech were not clearly defined in May 1992 and are not clearly defined today. When the unlawfulness of a particular action is not apparent to a reasonable person in light of pre-existing law and legitimate questions exist concerning whether the official violated the plaintiff's constitutional rights, the official is protected by qualified immunity. *Tarantino v. Baker*, 825 F.2d 772, 774-75 (4th Cir. 1987). In *Dimeglio v. Haines*, 45 F.3d 790, 805 (4th Cir. 1995), we recognized that "it was, and is, not clear that when an individual presents himself as

speaking in his capacity as a public employee, that his speech is protected." We went on to say that "only infrequently will it be 'clearly established' that a public employee's speech on a matter of public concern is constitutionally protected, because the relevant inquiry requires a 'particularized balancing' that is subtle, difficult to apply, and not yet well-defined." *Id.* at 806. In view of the difficulty that federal courts themselves have had in grappling with the concepts of academic freedom both as to the teacher and the educational institution, three business school professors and administrators not trained in the law could hardly be expected to recognize the contours of Scallet's rights.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

| | | |
|---|---|---|
| ROBERT J. SCALLET<br>Plaintiff, | ) | Civil Action No. 94-0016-C |
| v. | ) | MEMORANDUM OPINION |
| JOHN W. ROSENBLUM,<br>*et al.*<br>Defendants. | )<br>)<br>) | Judge James H. Michael, Jr. |

Plaintiff, a non-tenured instructor at the University of Virginia's Darden Graduate School of Business ("Darden"), brings this action pursuant to 42 U.S.C. § 1983, alleging that the defendants, three senior Darden faculty members, violated rights secured to Plaintiff under the First Amendment by refusing to renew his teaching contract in retaliation for his outspokenness on issues of "diversity" at Darden. Plaintiff seeks injunctive relief and damages for this alleged violation of his constitutional rights. Plaintiff has also brought defamation claims against the defendants for statements they made to the faculty member assigned to investigate the defendants' actions. Plaintiff contends that these statements were designed to effectuate a coverup of the true reasons defendants took the action they did.

This matter is currently before the court on defendants' motion for summary judgment. For the reasons stated herein, the court grants the motion with respect to the First Amendment claim. Consequently, the court declines to exercise supplemental jurisdiction over the state-law

defamation claims, *see* 28 U.S.C. § 1367 (c) (3), and, therefore, will not address the merits of those claims.

## I. Undisputed Facts

The following facts are undisputed. Plaintiff Robert J. Scallet became a full-time faculty member at Darden in 1988.[1] At Darden, Scallet taught a section of the Analysis and Communications course ("A & C"), a writing and speech class that all students are required to take in their first year at Darden. Scallet also had administrative responsibilities within the A & C department, serving as Course Head beginning in 1988. Scallet's responsibilities as Course Head included administering the course, managing other A & C faculty, and developing the curriculum for A & C. Def. Exh. 47, *Scallet Dep.* at 35-49.

Scallet was a strong advocate of "diversity" while at Darden. By that term, it is understood that Scallet championed, among other things, the goal of broadening both the traditional focus of classroom materials so as to make them more accessible to women and minorities, and the traditional underpinnings of the business community itself, so as to make that sphere more hospitable to the same.

In the fall of 1991, Defendant Smith, an Associate Dean at Darden, asked Scallet to take some "pieces of paper" off of the wall outside his office. Def Exh. 37, *Smith Dep.* at 145-148. Those pieces of paper consisted of various articles and cartoons that Scallet had posted. Pl. Exh. 38.

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[1] Scallet became a part-time faculty member in 1985.

In late April or early May of 1992, Defendant Harris, another Associate Dean at Darden, met with Scallet and suggested to him that his contract would be renewed for the 1992-1993 academic year. Def Exh. 45, *Harris Dep.* at 448 ("I had told [Scallet]... that it would be my recommendation that he had the position at Darden the following year"); Def. Exh. 46, *Rosenblum Dep.* at 245-46. Defendant Harris made the statement to Scallet "[b]ecause I, I felt that [Scallet] continued to be able to deliver some good instruction to the Darden students." *Id.* at 641. A few days later, however, Defendants Smith and Harris, together with Defendant Rosenblum, the Dean of Darden, met with the other members of the A & C faculty to discuss, outside of Scallet's presence, reported problems the A & C faculty were having with Scallet. At that meeting, the faculty members expressed concerns about their collective ability to continue working with Scallet. *See, e.g.*, Def. Exh. 13, *Helscher Aff.* At ¶ 8; Def. Exh. 8, *Rubin Aff.* At ¶ 14. A short time after this meeting, Dean Rosenblum informed Scallet that he would be relieved of his teaching duties for the 1992-1993 academic year[2] and that his contract would not be renewed thereafter. Def. Exh. 46, *Rosenblum* Dep. at 287; *Complaint* ¶ 31.[3]

In response, Scallet filed a grievance petition with the University in October 1992, seeking review of the adverse action. In his petition, Scallet alleged that Dean Rosenblum failed to renew his contract on account of Scallet's outspoken views regarding issues of diversity and "multiculturalism" at

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[2] Scallet was offered an administrative position for that term.

[3] All references to the complaint refer to the First Amended Complaint, filed on August 1,1994. Scallet filed his first complaint in this action on March 22, 1994.

Darden. Scallet's request for review prompted an internal investigation that culminated in a report prepared by Defendant Daniel Hallahan, a Professor in the School of Education and a member of the Faculty Relations Committee. That report contained comments from various members at Darden, including Dean Rosenblum, to the effect that Scallet was an ineffective member who possessed character defects. The report, issued in March 1993, concluded that there was no support for Scallet's contention that he was retaliated for his remarks about diversity. Pl. Exh. 1 at p. 7. However, the report contained a comment attributed to Defendant Rosenblum that "[t]here were a few faculty who did not like [Scallet's] activist orientation to the course, . . . ." *Id.* at 4.

In March 1994, Scallet filed the current lawsuit, naming Dean Rosenblum and Associate Deans Harris and Smith as defendants. Scallet's amended complaint contains seven counts, of which Counts One, Three, Four and Five are still before the court.[4] Count One alleges that the defendants, acting in their personal capacities, violated Scallet's First

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[4] Count Two alleges violations of Scallet's right to due process secured by the Fourteenth amendment. This court granted the defendants' partial motion for judgment on that count in December 1994. Count Six states a defamation claim against Professor Hallahan stemming from the issuance of his report to the President of the University. The Magistrate Judge recommended dismissing this count on the grounds that there was no evidence in the record that Hallahan acted with actual malice in preparing his report. Scallet has not filed an objection to this recommendation and conceded at oral argument before this court that he did not object to the recommended disposition of Count Six. Accordingly, the court grants defendants' motion for summary judgment with respect to Count Six without further discussion. Count Seven alleges breach of contract by the University. That count was dismissed as moot by this court on December 20, 1994.

Amendment rights by taking adverse employment action against him in response to Scallet's remarks about diversity, in violation of 42 U.S.C. § 1983.[5] [Because of its disposition, the court does not address defendants' argument that they enjoy qualified immunity for their actions]. Counts Three, Four and Five state individual defamation claims against defendants Rosenblum, Smith and Harris, respectively, for the statements they made to Professor Hallahan in the course of Professor Hallahan's investigation.

## II. Disputed Facts

### A.

The speech that Scallet alleges caused defendants to take the adverse action against him falls into three categories: (1) classroom discussions; (2) comments made by Scallet in faculty meetings; and (3) articles and cartoons posted by Scallet on the wall outside of his office. These three categories of speech are described briefly below.

First, Scallet contends that defendants objected to the content of his classroom discussions. Scallet maintains that "[s]enior faculty members were threatened by ... the issues Scallet was discussing in the classroom." *Complaint* ¶ 23. Scallet points to comments by Defendant Harris to Plaintiff

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[5] The court notes that Scallet's claim under the First Amendment is "not defeated by the fact that he did not have tenure. Even though he could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him, he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283 (1977)(citations omitted).

that "[Smith] and the others want all the social and political content stripped from your course." Pl. Exh. Tab 1, *Scallet Dep.* at 259. Specifically, Defendant Harris allegedly told Scallet that senior faculty members objected to Scallet's discussion of "power relationships" in corporate organization and his teaching the movie "Roger and Me."[6] *Id.* at 133, 136. Indeed, one senior member expressed concerns about Scallet's showing a "commie" movie at Darden. *Id.* At 115. Furthermore, Defendant Harris allegedly told Scallet that members of the faculty did not approve of two cases he used in class. One involved the target-marking of cigarettes to African-Americans and the other featured an Asian woman as the key decision-maker. *Complaint* ¶ 25. Defendant Harris did not indicate whether the senior faculty disagreed with the social and political content of the materials or if they thought it was pedagogically inappropriate. Pl. Exh. Tab 1, *Scallet Dep.* at 259. And as noted above, Defendant Rosenblum told Professor Hallahan that "[t]here were a few faculty who did not like [Scallet's] activist orientation to the course, . . ." Def. Exh. 1 at 4.

Scallet further contends that his 1991 request for summer funding was denied because he intended to use the grant to develop course materials that touched upon social and political issues. He was allegedly told by Defendant Harris that "[w]e don't want you doing that. Cross that off the list." Pl. Exh. Tab 1, *Scallet Dep.* at 258. More generally, Scallet claims that he was reprimanded on one occasion by Defendant Smith who stated that he "hated my tone, he hated ... the minority material I taught. He found me dangerous, he found me evil, I was undermining his

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[6] The movie is a documentary about General Motors plant closings in Flint, Michigan. *Scallet Deposition* at 112.

objectives for the school, . . . ." *Id.* at 222. During this same discussion, Defendant Smith allegedly intimated to Scallet that he had been trying to get Scallet fired for two years and stated now I am going to do it." *Id.*[7] When Scallet ultimately confronted Defendant Rosenblum about the non-renewal and asked whether Defendant Smith was the catalyst for it and further whether Rosenblum felt pressure to support Smith because Smith was an extremely influential member of the Darden who could help safeguard Rosenblum's own position at Darden, Rosenblum allegedly stated, "Yes, you've got most of the story. There are some details you don't have." *Id.* at 381.

Second, Scallet contends that defendants objected to Scallet's expression of views in faculty meetings concerning the "importance of developing case material that. . . reflect[ed] the experiences of women and minorities in the workplace" and "the ways in which issues of social responsibility in business could be incorporated into classroom discussions. *Complaint* ¶ 27, Pl. Exh. Tab 1, *Scallet Dep.* at 471-472. Defendant Harris allegedly told Plaintiff that he should mute his expression of views at faculty meetings because his "advocacy of certain views was ticking people off." *Id.* at 254. Scallet claims that "[s]ome senior faculty objected to my public expression of views related to Darden's pedagogy, the institution's position on academic freedom, faculty governance, the institution's mission statement, and the school's difficulty in incorporating diversity into its core curriculum." *Plaintiffs Answer to Interrogatory #16.* Scallet does not provide

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[7] Defendant Smith denies that he made such statements.

examples of specific comments to which defendants expressed concerns.[8]

Third, Scallet maintains that defendants objected to the materials Scallet posted on his door and on the wall outside his office. Specifically, Scallet alleges that Defendant Smith "complained about articles on the wall outside of Scallet's office dealing with issues of diversity in communications and ordered Scallet to remove them so that students could not see them." *Complaint* ¶ 26. The material at issue included a Guide to Nonsexist Language, a Doonesbury cartoon lampooning the prevalence of dual-track education for boys and girls, and an article concerning business and the environment. Pl. Exh. 38; Pl. Exh. Tab 1, *Scallet Dep.* at 346-351. Defendant Smith allegedly admonished Scallet that, "I want all this stuff gone," *id* at 349, and "I don't like the students reading that stuff." *Id.* at 351.

Thus, it is Scallet's contention that the defendants did not renew his contract for the 1993-1994 academic year, and relieved him of his teaching responsibilities for the 1992-1993 term, because they did not approve of the views he expressed regarding issues of diversity in the contexts described above. Scallet makes this argument in light of a political schism Scallet alleges existed on campus between advocates of diversity and those wedded to what Scallet terms "the Darden Way." As evidence of this schism, Scallet points to a May 1992 Report of the Ad Hoc Committee on the Status of Women at Darden, wherein the Committee concluded that "[t]here are widely held perceptions by the

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[8] Scallet conceded that Mr. Smith did not express concern about Scallet's remarks at faculty meetings. Def. Exh. 47, *Scallet Dep.* at 478-479.

faculty that . . . there is an inability (or an unwillingness) to address the underlying issues that diversity is creating. This has allowed particular problems to escalate to destructive proportion." Pl. Exh. 35 at 4.

B.

Defendants, in contrast, maintain that Scallet's contract was not renewed because he lacked essential collegiality skills that made it impossible for other members of the A & C faculty to coexist with him. Defendants also suggest that Scallet's classroom discussions disrupted the effective delivery of the A & C course and trenched upon course material taught outside the A & C department.

Defendants maintain that there were at least two complaints lodged against Scallet by members of the A & C faculty. Specifically, some members of the A & C faculty complained that Scallet had threatened them with termination if they did not agree to teach more class hours. Def Exh. 47, *Scallet Dep.* at 232-237; Def Exh. 37, *Smith Dep.* at 89-90. In addition, one A & C faculty member, Paula Wenger, protested to Defendant Harris that Plaintiff had excluded her from the hiring process of a potential A& C faculty member. Def Exh. 47, *Scallet Dep.* at 237. This latter dispute, defendants allege, mushroomed into a heated confrontation in a basement classroom between Scallet and Ms. Wenger, who was eight-months pregnant at the time. Defendants maintain that Scallet accosted Ms. Wenger so thoroughly about her going to Associate Dean Harris behind Scallet's back that she thereafter feared Scallet, refusing to work with Scallet alone, or even to be in the building with him at the same time. Def. Exh. 35, *Wenger Dep.* at 171-179, 224-227; Def. Exh. 14, Birch Aff. ¶ 6 ("She was

absolutely white and shaking. . . . She could hardly speak"). As a result of these complaints, Defendant Harris, in the spring of 1991, relieved Scallet of his management responsibilities over A & C, Def Exh. 47, *Scallet Dep* at 228, 243, 251-252, and took over the administration of the A & C course himself. *Id.* at 257-259.

The record indicates that Scallet had altercations with other female A & C instructors. During the winter of 1988-1989, Elizabeth Denton, who was pregnant, missed a speech class due to illness and was castigated by Scallet. Def. Exh. 3, *Denton Aff.* at ¶ 9. Ms. Denton eventually left Darden in part because of the treatment she received from Scallet during her tenure. *Id.* at ¶ 3. Scallet also allegedly subjected Virginia Germino to unwelcome details of his sex life. Def. Exh. 36, *Germino Dep.* at 303. There is evidence in the record as well that female students "dreaded" Scallet's classes because he made them feel uncomfortable and because his use of profanity interfered with their ability to focus on the material. Def. Exh. 14, *Birch Aff.* ¶ 9.

In addition to harassing colleagues, defendants maintain that Scallet fostered division within the A & C faculty and sabotaged some of his peers' classes. Defendants cite an instance wherein Scallet allegedly told a colleague, who was preparing to lecture Scallet's and Ms. Wenger's class, to present one type of lecture even though the students were expecting a different type of lecture. Scallet allegedly chuckled when the technician confronted him because, Scallet believed, Ms. Wenger would be held responsible for the gaffe. Def. Exh. 7, *Arbogast Aff.* at ¶ 10-11.

Defendants also point out that each and every member of the A & C faculty who served with Scallet testified that

Scallet was extremely difficult to work with because he fostered an environment of fear and distrust, especially among the female faculty. *See* Def. Exh. 6, *Vaughn Aff.* ¶ 3-5 ("he personalized disagreements . . . acted as a law onto himself . . . engendered a climate of distrust"); Def. Exh. 4, *Howard Aff.* ¶ 3-4 ("I found working with him very difficult and unsettling, and so I attempted to avoid him as much as possible"); Def. Exh. 36, *Germino Dep.* at 304-307 ("I was afraid of him . . . I hated going to my job"); Def. Exh. 7, Arbogast *Aff.* ¶ 2 ("I personally experienced Cid Scallet undermine me and Paula Wenger in a lecture before sixty students").

Defendants argue that Scallet created problems within A & C by failing to teach the same material taught by other A & C faculty. This failure, defendants allege, disrupted the A & C agenda because A & C was supposed to be taught in a uniform fashion so that students from different sections could more easily interact outside the classroom. Def. Exh. 8, *Rubin Aff.* at ¶ 9. Scallet's deviations from the program, defendants contend, disrupted the classes of other A & C faculty because students protested the divergence. *Id.* ("students complained to me at the beginning of a class that they did not think they should have to perform the assignment because students in Cid Scallet's class were doing something else. It was a significant disruption in my class"); Def. Exh 13, *Helscher Aff.* ¶ 8 ("we had to teach a separate course from Cid and that created intolerable tension among us"). Most significantly, defendants allege that the Scallet's classroom material trenched upon material taught by other teachers throughout Darden, some of whom expressed concerns about Scallet's course content. Def. Exh. 47, *Scallet Dep.* at 98, 108, 146. The record indicates that two operations professors expressed concern "that we were

teaching material that stepped on the toes of the Operations course." *Id.* at 146. In addition, a Marketing professor asked "what the heck we were doing teaching a marketing case in A & C?" *Id.* at 108. All of these concerns, and some others, were voiced at the May 1992 meeting between the defendants and the other members of the A & C faculty.[9]

Thus, defendants argue that they took the adverse action against Scallet because his disruption of the A & C mandate, accomplished both through the material he taught and through the ways in which he abrasively interacted with his colleagues, created an untenable situation that warranted, indeed necessitated, the action taken.

C.

Scallet suggests that defendants' proffered reasons for the non-renewal are pretextual. Specifically, Scallet maintains that he was an effective teacher who was able to work successfully with other members of the A & C faculty, given considerable structural strains present within the department. In his view, it is patently incredible that the defendants would fall to renew his contract based upon the accusations of members of the A & C faculty.

Scallet maintains that "[i]t was well-known at Darden that Plaintiff was one of the most successful and popular faculty members among the students." *Complaint 22; Megibow Aff.* ¶ 3 ("I was struck by the parade of students

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[9] There is also evidence in the record that at least one case Scallet taught offended some students because the word "nigger" appeared as did a reference to the male sexual organ. Def. Exh.47, *Scallet Dep.* At 70-76, 86.

who came to Mr. Scallet for help of all kinds"). Indeed, one month before the non-renewal, Scallet was nominated by the student body for a major teaching award. More than half of the first-year class signed the nominating petition. Pl. Exh. C ("As a teacher in the classroom, [Scallet] is unparalleled in his ability to communicate and instill in students the desire to make learning a fundamental part of their lives"). Scallet also paints himself as an outstanding colleague, willing to collaborate with anyone to solve any problem plaguing Darden. *See Beckenstein Aff.* ¶ 3 ("Of the ten course heads with whom I worked, Mr. Scallet was one of the most helpful and valuable. . . . I could not think of a better team player").

With respect to the A & C faculty, Scallet argues that whatever tension existed was a product of the fact that Scallet was the only full-time instructor. Other A & C instructors worked as little as 3 hours per week, Pl. Exh. 24, and interaction between the A & C faculty outside formal meetings, was sparse. Pl. Exh. Tab 1, *Germino Dep.* at 43-44. In fact, Scallet maintains that he interacted more with the Associate Director of Placement than he did with the other A & C faculty. Pl. Exh. Tab 1, *Scallet Dep.* at 596. This structural deficiency, Scallet alleges, created frictions. Indeed, Scallet's successor as Course Head of A & C, Jon Megibow, states that shortly after he assumed control of A & C, one of the A & C faculty complained to Defendant Harris about a change Mr. Megibow had made in the curriculum. Upon learning of the complaint, Megibow told the instructor that his conduct was unprofessional and threatened to fire him. *Megibow Aff.* At ¶ 9. Mr. Megibow concluded that "[i]n some of the instructors, there was a clear lack of commitment to the course and their jobs, at least in part because of the part-time nature of their positions. Others

were contentious and had no sense of reasonable faculty behavior - they were unable to put the course ahead of their private agendas or to work as members of the team." *Id.* at ¶ 10.

Scallet maintains that it strains credulity to suggest that Scallet's interactions with the A & C faculty prompted his non-renewal -- in light of the depth of his popularity with the students and his demonstrated collegial disposition with other members outside the A & C department. Moreover, Scallet argues that the absence of any documentation in his personnel file evidencing any criticism, the failure of the defendants to allow him to respond to the criticism leveled against him in his absence at the final A & C faculty meeting with the defendants, and the fact that Defendant Harris had told Scallet just days before the adverse action was taken that he would recommend that Scallet's contract be renewed, all belie defendants' assertion that Scallet's professional conduct in some way precipitated the action taken.

## III. Summary Judgment

Upon a motion for summary judgment, the court will consider the evidence and affidavits of the parties in light of the pleadings, drawing all facts and inferences in favor of the non-moving party. *See Anderson v. Liberty Lobby,* 477 U.S. 242, 248 (1996); *Charbonages de France v. Smith,* 597 F.2d 406 (4th Cir. 1979). The defendants are entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. . . ." Fed. R. Civ. P. 56 (c).

The plaintiff is entitled to have the credibility of all his evidence presumed. *Miller v. Leathers,* 913 F.2d 1085, 1087 (4th Cir. 1990), *cert. denied,* 111 S.Ct 1018 (1991). Before the plaintiff must face the burden of demonstrating the existence of a triable issue of fact, the defendants must meet their burden of showing the absence of evidence to support plaintiff's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *see also Cray Communications, Inc. v. Novatel Computer Systems, Inc.,* 33 F.3d 390, 393-394 (4th Cir. 1994). There must be more than a "scintilla" of evidence to support plaintiff's case. *Anderson,* 477 U.S. at 248. Rather, the evidence must be sufficient to "return of verdict" for plaintiff at trial. *Id.*

## IV. Analysis

### A. Choosing a Legal Framework

It is axiomatic that "[a] state may not dismiss a public school teacher because of the teacher's exercise of speech protected by the First Amendment." *Stroman v. Colleton County Sch. Dist.,* 981 F.2d 152, 155-56 (4th Cir. 1992); *Rankin v. McPherson*, 483 U.S. 378, 383 (1987) ("It is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of expression"). Determining, however, the exact scope of a teacher's first amendment protections is an intricate endeavor.

In *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Supreme Court articulated a test for identifying the scope of first amendment protection afforded teachers' out-of-class speech. In *Pickering,* the Court held that lower courts must strike a balance "between the interests of the

[employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568. The balancing test which this pronouncement spawned is, obviously, germane to the analysis of Scallet's out-of-class speech -- that is, to Scallet's remarks at faculty meetings and to his placement of articles and cartoons outside his office -- and it will be employed for that purpose.

However, Scallet also alleges that the defendants retaliated against him for his in-class speech. The Supreme Court, though, has never spoken to the level of first amendment protection afforded teachers' speech. *See* Note, *Public School Teachers and the First Amendment: Protecting the Right to Teach,* 65 N.Y.U.L. REV. 693, 696 (1990)("No Supreme Court opinion . . . has analyzed directly the protection that the first amendment affords teachers in the classroom").

Lower federal courts have sought to fill this void in several ways. *See generally, id.* (discussing first amendment rights of primary and secondary school teachers' classroom speech). Some courts have simply appropriated Pickering's balancing test for use in the context of the university classroom. *See, e.g., Dambrot v. Central Michigan University,* 55 F.3d 1177 (6th Cir. *1995); Blum v. Schlegel,* 18 F.3d 1005 (2d Cir. 1994); *Martin v. Parrish,* 805 F.2d 583 (5th Cir. 1986); *Cohen v. San Bernardino Valley College,* 883 F. Supp. 1407 (C.D.Cal. 1995).[10]

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[10] "The Second Circuit appeared to adopt the *Pickering* test in *Blum v. Schlegel,* 18 F.3d 1005 (2d Cir. 1994). In that case, a state law school professor claimed that he was denied tenure because *"[i]n classes* and in

Other courts have looked to such Supreme Court cases as *Tinker v. Des Moines Independent School District,* 393 U.S. 503 (1969) and *Hazelwood School District* v. *Kuhlmeier,* 484 U.S. 260 (1988), where the Court discussed the scope of students' first amendment rights in the classroom. *See, e.g. Ward v. Hickey,* 996 F.2d 448 (1st Cir. 1993)(discussing *Hazelwood); Miles v. Denver Public Schools,* 944 F.2d 773 (defendants' 10th Cir. 1991)(same); *Zykan v. Warsaw Community Sch. Corp.,* 631 F.2d 1300, 1306-07 (7th Cir. 1980)(dicta)(discussing *Tinker); James v. Bd. of Educ.,* 461 F.2d 566, 571-75 (2d Cir.)(same), *cert. denied,* 409 U.S. 1042 (1972). For example, in *Miles v. Denver Public Schools,* 944 F. 2d 773 (10th Cir. 1991), the court adopted a two-prong test derived from *Hazelwood*

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campus publications, Blum advocated the legalization of marijuana and criticized national drug control policy. For example, Blum in his First Amendment class set a number of hypotheticals in the context of the current drug war. Blum also published two pieces in a campus publication and participated in a debate regarding civil disobedience." *Id.* at 1011-12 (internal citation, quotation and footnote omitted)(emphasis supplied).

The Second Circuit did not distinguish between Blum's in-class remarks and pedagogy on the one hand, and his out-of-class expressions, on the other. Instead, the court simply applied the *Pickering* balancing test to Blum's speech as a whole. Specifically, the court held that Blum's speech interest outweighed the efficiency interest proffered by the University as a justification for restricting Blum's speech. The court held that "the efficient provision of services by a State university's law school actually depends, to a degree, on the dissemination in public fora of controversial speech implicating matters of public concern. Blum's speech, therefore, does not impair the interests of the state in efficient provision of services through its law school." *Id.*

Since the court did not distinguish between Blum's out-of-class expressions and his classroom expression, it is difficult to tell whether the court actually endorsed the *Pickering* test for use in the context of a law school classroom. It is clear, however, that the court endorsed a broad conception of protected speech in the graduate school setting.

*School District v. Kuhlmeier*, 484 U.S. 260 (1988), where the Supreme Court held that "[e]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273. Extending the holding in *Hazelwood* to the in-class expression of a ninth grade teacher, the *Miles* court held that a school may restrict a teacher's in-class expression if (1) it has a legitimate pedagogical interest in abridging the speech, and (2) the school's restriction on the speech is reasonably related to that interest.

The *Miles* court declined to use the *Pickering* balancing test, stating that while "the *Pickering* test accounts for the state's interests as an employer, it does not address the significant interests of the state as educator." *Id.* at 777. The court articulated those "significant interests" as assuring "that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school" *Id.* (quoting *Hazelwood*, 484 U.S. at 271). The court acknowledged that *Hazelwood* involved students' expression in a secondary school and not teachers' expression in the classroom. However, the court concluded that there is "no reason to distinguish between students and teachers where classroom discussion is concerned." *Id.* (interim quotation omitted).

Finally, at least one court has fashioned its own balancing test. *See Bishop v. Aronov,* 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992).[11]

In the absence of clear guidance, this Court will apply the *Pickering* balancing test to determine the level of first amendment protection afforded Scallet's in-class speech. The court notes that the cases in which the *Hazelwood* test is employed do not address the in-class speech of teachers at the university or graduate school level. Rather, those cases

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[11] In this case, Dr. Bishop, a university professor of exercise physiology, interjected his religious beliefs into classroom discussions, telling students that he modeled his life after Christ because he felt that it was "the wisest thing I can do." *Id.* at 1068. He informed students that they need not share his views but that they should understand his "bias." The university required that Dr. Bishop discontinue his "interjection of religious beliefs and/or preferences during instructional time periods." *Id.* at 1069.

In analyzing Dr. Bishop's claim that the university's restraint of his classroom speech violated the First Amendment, the court created its own multi-factor test, based upon its reading of *Hazelwood.* First, the court noted the classroom context of the speech, stating that such a context forced the court to consider the "coercive effect upon students that a professor's speech inherently possesses and that the University may wish to avoid." *Id.* at 1074. Indeed, student complaints regarding Professor Bishop's religious remarks suggested that the students felt coerced by them. *Id.* Second, the court considered the university's position as a public employer "which may reasonably restrict the rights of employees more readily than the those [sic] of other persons." *Id.* In this vein, the court considered "the University's authority to reasonably control the content of its curriculum, particularly that content imparted during class time." *Id.* The court also considered the possibility that classroom speech could "give the appearance of endorsement by the university." *Id.* Finally, the court considered "the strong predilection for academic freedom as an adjunct of the free speech rights of the First Amendment." *Id.* at 1075. Applying this balance, the court concluded that "the University's interests in the classroom conduct of its professors are sufficient ... to warrant the reasonable restrictions it has imposed on Dr. Bishop." *Id.* at 1076.

deal with the in-class speech of secondary school teachers. Thus, the "significant interests" discussed in *Hazelwood* that justify the restriction, in certain instances, of teachers' in-class speech, are not implicated to the same extent, if at all, in the context of higher education. Certainly the interest in assuring "that readers or listeners are not exposed to material that may be inappropriate for their level of maturity" is not implicated in the graduate school context. *Hazelwood,* 484 U.S. at 271. Furthermore, the interest in assuring that "the views of the individual speaker are not erroneously attributed to the school" is not as strongly implicated in the context of higher education, where students are not so easily cowed by the assertion of the apparent authority the classroom fosters. *Id.* In addition, while the Supreme Court has recognized that communities have a legitimate interest in attempting to inculcate certain values in students through public education, *see, e.g., Bd. of Educ. v. Pico,* 457 U.S. 853, 863-64 (1982)(plurality opinion) (courts should allow school boards freedom to set school curriculum in manner that transmits community values to students), achieving some sort of uniform value system is not part of the mandate of higher education. Indeed, it is anathema to the intellectually maverick environments of the university and graduate school. *See Tilton v. Richardson,* 403 U.S. 672, 685-686 (1971).[12] Thus, the pedagogical interest in restricting teacher's in-class speech is not as strongly implicated in the context of higher education.

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[12] Moreover, *Hazelwood* concerned itself with students' in-class speech, not with the in-class speech of teachers. Although the *Miles* court did not view this as a significant difference, this court suggests that it might be since teachers are the ones charged with pushing the intellectual envelope.

Thus, the court opts for the *Pickering* test. The court notes that it has reservations about extending the *Pickering* analysis to the in-class speech of university professors and graduate school instructors since the test does not explicitly account for the robust tradition of academic freedom in those quarters. *See Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom"). However, the court concludes that this interest can be accounted for within the parameters of the balancing test by properly defining the extent of the teacher's interest in the speech.[13] Accordingly, the court turns below to the *Pickering* analysis.

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[13] The court notes that it declines to rely on the *Bishop* case, *see* n.11, *supra,* because the Establishment Clause concerns that lurked throughout the analysis in that case are wholly absent from the current case. See *Bishop*, 926 F.2d at 1077 ("Because of the potential establishment conflict, even the appearance of proselytizing by a professor should be a real concern to the University"); *id.* at 1074 (noting that classroom speech could "give[] the appearance of endorsement by the University"). Thus, the court concludes that the issue addressed in *Bishop* limits the relevance of its analysis. *See* Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third "Essential Freedom"*, 45 Stan. L. Rev. 1835,1847 (1993)("Th[e] holding exceeds by a margin the rationale necessary to find for the University. The court could have fashioned a more carefully reasoned argument, based on higher education precedents, that religion is *sui generis,* that supplementary lectures and personal remarks on religious beliefs are highly suggestive, that religious views are not germane to an exercise physiology (or math) class. and that a faculty committee had reviewed the matter and given Bishop the opportunity to explain his pedagogical choices").

B. Explicating the Chosen Framework

In an effort to achieve the balance described in *Pickering,* the Fourth Circuit has developed a three-prong test to analyze the level of first amendment protection afforded the speech of government employees. First, the court must determine "whether [Plaintiff's] speech involved an issue of public concern." *Hall v. Marion Sch. Dist. No. 2,* 31 F.3d 183, 192 (4th Cir. 1994). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Meyers,* 461 U.S. 138, 147-148 (1983). Such an inquiry is one of law for the court to undertake. *Id.* at 148 n. 7. The Supreme Court in *Connick v. Meyers*, 461 U.S. 138 (1983), made the following comments with respect to distinguishing expression relating to public concerns from purely private expression:

> When employee expression cannot be fairly considered as relating to any matter of political social or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.
>
> [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

*Connick*, 461 U.S. at 146-147. The Fourth Circuit has narrowed the inquiry under the prong, holding that "[t]he focus is . . . upon whether the 'public' or the 'community' is likely to be concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a 'private' matter between employer and employee." *Berger v. Battaglia*, 779 F.2d 992, 999 (4th Cir. 1985), *cert denied*, 476 U.S. 1159 (1986).

Second, if the speech at issue does relate to an issue of public concern, then the court must next "decide whether [Plaintiff's] exercise of free speech is outweighed by the 'countervailing interest of the state in providing the public service the teacher was hired to provide.'"[14] *Id.*, at 192 (quoting *Stroman v. Colleton County Sch. Dst.*, 981 F.2d, 152, 156 (4th Cir. 1992)). This determination is a question of law. *Id.* at 194. In making its judgment on this element, the court may consider whether the speech "impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987)(citing *Pickering*, 391 U.S. at 570-73). Moreover, "[w]hen an employee's speech substantially involves matters of public concern . . . the state must make a stronger showing of disruption in order to prevail." *Hall*, 31 F.3d at 195 (citing *Connick*, 461 U.S. at 152); *see also*

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[14] The court in *Hall* discussed this part last. However, the Fourth Circuit has commented that "[s]ince each part affords a possible independent basis for judgment, the order of inquiry may vary with the circumstances of the case." *Daniels v. Quinn*, 801 F.2d 687, 689 (4th Cir. 1986).

*Bieluch v. Sullivan,* 999 F.2d 666, 671 (2d Cir. 1993)("If the employee's speech substantially involved matters of public concern, the government must make a stronger showing of interference with operations than occurred in *Connick"), cert. denied,* 114 S.Ct 926 (1994).

Third, the court must determine "whether [Plaintiff] would have been dismissed 'but for' her protected speech." *Id.* This inquiry is a factual one and involves two steps.

> In the first step, the employee bears the burden of establishing the requisite causation to prove that the protected speech was a motivating factor or played a substantial role in the discharge. *Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle,* 429 U.S. 274, 287, 97 S.Ct at 576, 50 L.Ed.2d 471 (1977). If the employee is able to prove such, the second step shifts the burden to the employer to put forward evidence that it would have fired the employee even in the absence of the protected speech. *Id.*

*Id.* at 193.

The court undertakes this three-pronged analysis below, first with respect to Scallet's in-class speech, next with respect to Scallet's remarks in faculty meetings and finally with respect to the articles and cartoons Scallet posted on his office door and on the wall outside his office. However, the court will defer discussion of the third prong - the causation prong - until it has addressed whether all three categories of speech are protected under the first two prongs. For if they are, the court must address the causation prong in light of that finding so as to avoid analyzing the issue in piecemeal fashion. For instance, it would be inappropriate for the court

to find that, by itself, each category of speech was not the "but for" cause of defendants' action, when, if examined together, it becomes apparent that Scallet's protected speech as a whole was the cause of the non-renewal.

C. Applying the Framework: Protected Speech

1. Classroom Speech

Scallet contends that the defendants failed to renew his contract for the 1993-1994 academic year, and relieved him of his teaching responsibilities for the 1992-1993 term, in part, because of the issues Scallet discussed in the classroom.

Under the *Pickering* analysis, the court must first determine as a matter of law, whether the general classroom discussions Scallet initiated and the classroom material Scallet presented, relate to matters of public concern.

Defendants contend that Scallet's classroom speech relates simply to issues of curriculum which cannot be characterized as matters of public concern. Rather, defendants maintain, Scallet was simply discharging his duties as an employee of Darden when he made his classroom remarks, thereby stripping them of any public relevance. Defendants cite *Holland v. Rimmer*, 25 F.3d 1251 (4th Cir. 1994) for the proposition that "in-house communications between employees speaking as employees," *id.* at 1256, cannot relate to matters of public concern. In *Holland*, a county Director of Social Services claimed that he was terminated in response to the "internal discipline meted out by [Plaintiff] to his subordinates." *Id.* at 1255. Plaintiff claimed that his communications with his subordinates was protected by the First Amendment.

Defendants' reliance on *Holland* is misplaced. Unlike the plaintiff in *Holland*, Scallet, as an educator, routinely and necessarily discusses issues of public concern when speaking as an employee. Indeed, it is part of his educational mandate. *See* Note, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U.L. REV. 693, 702 (1990) ("[A] teacher's in-class expression has dramatic public repercussions because of its role in educating students. A teacher's speech . . . offers students ideas and arguments that may be very much a part of public debate . . .").

More importantly, defendants' argument seriously misconceives the relevance of classroom debate in our democratic society. To suggest that the First Amendment, as a matter of law, is never implicated when a professor speaks in class, is fantastic. "For decades it has been clearly established that the First Amendment tolerates neither laws nor other means of coercion, persuasion or intimidation 'that cast a pall of orthodoxy' over the free exchange of ideas in the classroom." *Dube v. State University of New York*, 900 F.2d 587, 598 (2d Cir. 1990) (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 17 L. Ed. 2d 629, 87 S. Ct. 675 (1967), *cert. denied*, 501 U.S. 1211 (1991)). Indeed, "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools," *Shelton v. Tucker*, 364 U.S. 479, 487, 5 L. Ed. 2d 231, 81 S. Ct. 247 (1960). As the Supreme Court stated in *Sweezy v. New Hampshire*, 354 U.S. 234, 1 L. Ed. 2d 1311, 77 S. Ct. 1203 (1957):

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that

> is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

*Id.* at 250; *see also Wieman v. Updegraff*, 344 U.S. 183, 195, 97 L. Ed. 216, 73 S. Ct. 215 (1952) (Frankfurter, J., concurring) (unwarranted inhibition of thought chills "that free play of the spirit which all teachers ought especially to cultivate and practice").

Thus, the First Amendment is routinely implicated in the classroom, both at the university level and below. *See, e.g., Dube, infra.* (Professor's classroom remarks equating Zionism with Nazism and apartheid protected under First Amendment); *Blum v. Schlegel*, 18 F.3d 1005, 1011 (2d Cir. 1994) (law professor's in-class advocacy of legalizing marijuana protected under First Amendment); *Kingsville Independent Sch. Dist. v. Cooper*, 611 F.2d 1109 (5th Cir. 1980) (high school teacher's use of controversial play-acting to teach history of Reconstruction protected by First Amendment); *Minarcini v. Strongsville Sch. Dist.*, 541 F.2d 577 (6th Cir. 1976); *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969).

In short, defendants' sweeping argument that a university instructor's classroom remarks, as a matter of law, cannot be characterized as addressing matters of public concern warranting first amendment protection, fails to convince.

Of course, not all classroom speech implicates matters of public concern. *See Dambrot* v. *Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995) (college basketball coach's use of the word "nigger" not protected under First Amendment because did not relate to a matter of public concern); *Martin v. Parrish*, 805 F.2d 583 (5th Cir. 1986) (cursing in classroom not protected under First Amendment because not an issue of public concern). However, it appears unassailable that Scallet's advocacy of diversity, through the materials he taught in class, relate to matters of public concern. Debate is incessant over the role of diversity in higher education, employment and government contracting, just to name a few spheres. Indeed, political debate over issues such as affirmative action is inescapable.

Thus, the court concludes that Scallet's classroom speech concerning diversity relates to a core issue of public concern. *See Blum v. Schlegel*, 18 F.3d 1005, 1012 (2d Cir. 1994) (finding, in part, that law professor's use of in-class hypotheticals as mechanism to advocate the legalization of marijuana "on its face implicates [a] matter[] of public concern"); *Cohen v. San Bernardino Valley College*, 883 F. Supp. 1407, 1417 (C.D.Cal. 1995) (concluding after surveying case law, that tenured professor's classroom discussions and assignments on pornography "are matters of concern to the community and thus are topics of public concern").

Moreover, the fact that Scallet's statements were made in the classroom and not in the public square does not strip them of their inherently public quality. In *Connick*, the Court noted that in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 58 L. Ed. 2d 619, 99 S. Ct. 693 (1979),

> we held that First Amendment protection applies when a public employee arranges to communicate privately with his employer rather than to express his views publicly. Although the subject matter of Mrs. Givhan's statements were not issues before the Court, it is clear that her statements concerning the School District's allegedly racially discriminatory policies involved a matter of public concern.

*Connick*, 461 U.S. at 146; *see also Mumford v. Godfried*, 52 F.3d 756, 759-60 (8th Cir. 1995), *and cases cited therein.*

In sum, the context of Scallet's classroom speech, that is as part of the A & C curriculum, does not metamorphosize speech addressing social issues into parochial musings, unrelated to the world beyond the ivory towers of the Business School.[15]

The court must next "decide whether [Plaintiff's] exercise of free speech is outweighed by the 'countervailing interest of the state in providing the public service the teacher was hired to provide.'" *Hall*, 31 F.2d at 192 (quoting *Stroman*, 981 F.2d at 156).

Defendants argue that the defendants' interest in controlling the A & C curriculum outweighs Professor Scallet's interest in his classroom speech.[16] Defendants

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[15] Of course, this leaves unresolved the propriety of teaching multiculturalism and diversity in a class devoted to the teaching of writing and speech.

[16] Defendants do not concede that they took the adverse action against Scallet because of his expressions regarding diversity. Rather, for purposes of summary judgment, they argue that even if they had taken the

argue that the course Professor Scallet taught was a "uniform writing and speech course, an integral part of Darden's required first-year curriculum. Each student received the same course material and was to receive the same instruction, although the course was taught in different sections by different instructors. There can be no doubt that Darden as an institution had a powerful interest in the content of the A & C curriculum and its coordination with the content of other required courses . . . ." *Defendants' Memorandum* at 49.

Defendants maintain that Scallet's forays into issues of diversity caused significant disruption within the A & C department. Indeed, some students protested the divergence between the material taught in class sections. Defendants also suggest that Scallet's classroom speech intruded on the material taught by other teachers in other courses at Darden. And as an institutional matter, defendants maintain that it is the school's prerogative to decide whether business ethics and diversity issues are taught in the first-year Business Ethics class by a professor with an M.B.A, or by an instructor in the first-year writing and speech class who has no business background. *See* Def. Exh. 9, *Freeman Aff.* ¶ 4 (discussing first-year Business Ethics class). In short, defendants maintain that they needed to take control of the A & C curriculum and that the First Amendment does not prohibit them from doing so. *See e.g.*, *Bradley v. Pittsburgh Bd. Of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990) (public school teachers have no right to choose "their own curriculum or classroom management techniques in contravention of school policy or dictates").

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action to stifle Scallet's speech, they had a legitimate, constitutional reason for doing so.

The court recognizes that it is called upon in this case to strike a difficult balance between important, competing interests. On the one hand, the court must consider Darden's educational mandate. On the other hand, the court must consider Scallet's status as an instructor at an institution of higher education. In this latter regard, the court must:

> give weight to the nature of the employee's job in assessing the possible effect of his action on employee morale, discipline or efficiency. In so doing, it must be recognized that such effect may vary with the job occupied by the employee. In analyzing the weight to be given a particular job in this connection non-policymaking employees can be arrayed on a spectrum, from university professors at one end to policemen at the other. State inhibition of academic freedom is strongly disfavored. . . . In polar contrast is the discipline demanded of, and freedom correspondingly denied to policemen.

*Jurgensen v. Fairfax County, Va.*, 745 F.2d 868, 880 (4th Cir. 1984) (citations omitted). Moreover, the court must consider that when, as here, "an employee's speech substantially involves matters of public concern . . . the state must make a stronger showing of disruption in order to prevail." *Hall*, 31 F.3d at 195 (citing *Connick*, 461 U.S. at 152).

In attempting to strike the proper balance, the court concludes that the resolution of the legal issue of whether Scallet's in-class speech is protected by the First Amendment, depends upon a factual resolution of whether Scallet's classroom speech did indeed disrupt, or sufficiently threaten to disrupt, Darden's educational mandate in a

significant way. For if it did, the court concludes that the First Amendment provides no protection for Scallet's in-class speech. However, if Scallet's classroom speech did not undermine the A & C course, nor other classes at Darden, then the First Amendment protects that speech since the defendants offer no other countervailing interest in repressing it.

Although the court's analysis turns on the resolution of this factual issue, the analysis, at bottom, is a question of law that the court must resolve. *See Joyner v. Lancaster*, 815 F.2d 20, 23 (4th Cir.) ("Joyner contends that it is the province of a jury or fact finder to determine the underlying facts to which the court then applies the legal standard. The clear implication of *Connick*, however, is to the contrary"), *cert. denied*, 484 U.S. 830, 98 L. Ed. 2d 62, 108 S. Ct. 102 (1987); *Jackson v. Bair*, 851 F.2d 714 (4th Cir.), *withdrawn*, 863 F.2d 1162 (4th Cir. 1988) ("as is often the case in constitutional litigation, these ultimate issues of constitutional law inevitably embrace subsidiary issues of pure historical fact which establish the context in which ... the appropriate balance of competing interests must be legally assessed in particular cases").

The court finds, as a factual matter, that Scallet's in-class speech, that is, his use of certain materials for classroom discussion, did disrupt Darden's pedagogical mission. The record indicates that tight control over the A & C curriculum was necessary to ensure uniformity across class sections.[17] The record further indicates that Scallet's

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[17] Scallet cites a 1992 memorandum for the proposition that uniformity across class sections was not required for effective delivery of the A & C course. The memorandum, written from Scallet to three other

in-class speech, in the form of the materials he used and the discussions those materials fostered, created disruption within the A & C department, hampering the school's ability effectively to deliver the A & C course to its students. Furthermore, there is evidence in the record that Scallet's use of particular material in his classes created divisions within the A & C faculty, a fact this court considers in striking its balance. *Rankin v. McPherson*, 483 U.S. 378, 388, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987) (citing *Pickering*, 391 U.S. at 570-73). Moreover, the record indicates that Scallet's in-class pedagogy adversely affected the functioning of Darden as a whole. It is undisputed that several faculty members outside the A & C department expressed concerns to Scallet about his class trenching upon their own.

The court notes that there is evidence in the record that could suggest that Scallet's classroom speech did not disrupt Darden's mission in any significant way. For example, it is undisputed that the A & C department still utilizes the "Hoffman" case even though that case drew complaints from members of the Darden faculty. Def. Exh. 8, *Rubin Aff.* ¶ 16. If Scallet's use of that case did indeed intrude on other courses or created other problems within A & C, then it would be fair to assume that the case would have been dropped from the curriculum. However, the court must look

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A & C instructors concerning two upcoming A & C classes, states "it would be nice if we could put together a packet of material for those two classes that all of us would use." However, the memorandum concludes by stating that "of course, if you would like to put together your own material to suit your own particular purposes, you should feel free to do so." Pl. Exh. 23. The court finds that this memorandum, relating to two specific classes in 1992, by itself, does not contradict other evidence in the record to the effect that the A & C course must be delivered in a uniform fashion to be effective.

at the entire record, and upon doing so, the court is convinced that Scallet's in-class speech was in fact disruptive.

Given the court's factual finding that Scallet's in-class speech was disruptive, the court concludes, as a matter of law, that the speech is not protected by the First Amendment. The State's interest in the effective administration of its duties outweighs Scallet's interest in teaching his own material, where teaching that material hampers the State's ability to fulfill its duties. *See Cohen v. San Bernardino Valley College*, 883 F. Supp. 1407 (C.D.Cal. 1995) (holding that university professor's interest in discussing pornography in class, although an issue of public concern, outweighed by state's interest in effectively educating its students). Scallet could have found, and no doubt did, other, perhaps more appropriate, outlets for expressing his opinions about diversity. *See Bishop v. Aronov*, 926 F.2d 1066, 1076 (11th Cir. 1991), *cert. denied*, 505 U.S. 1218, 120 L. Ed. 2d 897, 112 S. Ct. 3026 (1992) ("The University has not suggested that Dr. Bishop cannot hold his particular views; express them, on his own time, far and wide and to whomever will listen; or write and publish, no doubt authoritatively, on them; nor could it so prohibit him"); *DiMeglio v. Haines*, 45 F.3d 790, 805-806 (4th Cir. 1995) ("Even if [plaintiff] was speaking as a private citizen and on a matter of public concern . . . it is still not clear that his speech would have been protected, since the interest of the State in preventing disruption of the orderly management of its offices might well have outweighed [plaintiff]'s interests in expressing

himself on the subject and in the manner, time, and place that he did").[18]

Thus, the court concludes that Scallet's in-class speech is not protected by the First Amendment.

2. Faculty Meetings

Scallet alleges that the defendants objected to his comments at faculty meetings regarding the "importance of developing case material that . . . reflected the experiences of women and minorities in the workplace" and "the ways in which issues of social responsibility in business could be incorporated into classroom discussions. *Complaint* ¶ 27, Pl. Exh. Tab 1, *Scallet Dep.* at 471-472.[19] Scallet also contends that Defendant Harris told him that he should mute his expression of views at faculty meetings because his

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[18] The court also concludes that Darden's interest in controlling the channels through which its students receive the curriculum outweighs Scallet's interest in his classroom speech. It is proper for Darden, as an institution, to cabin the teaching of certain material within certain fora if it believes that any other pedagogical regime would compromise the delivery of the material. Thus, if school administrators believe, as they apparently do, that a required first-year class on business ethics is the most appropriate forum in which to teach issues of diversity, they are entitled to make that judgment and to bring it to fruition. Otherwise, the court may well be engaged in that "intrusive oversight by the judiciary in the name of the First Amendment" cited in *Connick, supra*, at 146.

[19] How this desire, once accomplished, would integrate in a curriculum designed for, and devoted to, writing and speech presents a pedagogical question properly to be resolved by the institution.

"advocacy of certain views was ticking people off." *Id.* at 254.[20]

It is manifest that Scallet's speech at faculty meetings related to matters of public concern. Scallet's expressed desire to reconstruct A & C cases to reflect the psychology of women and African-Americans in the workplace, although curricular in nature, cannot be said to relate to matters solely of institutional or personal concern since it also speaks to the general debate on multiculturalism that currently thrives in all quarters of American society. To characterize Scallet's remarks in faculty meetings as "essentially a 'private' matter between employer and employee," *Berger*, 779 F.2d at 999 (4th Cir. 1985), mischaracterizes the nature of the expression. Scallet was speaking not as a disgruntled employee, about some issue of only parochial concern to him or in which he had some vested interest. *See Hanton v. Gilbert*, 36 F.3d 4, 7 (4th Cir. 1994) (holding that speech related primarily to "personal dissatisfaction with the terms of . . . employment" does not implicate matter of public concern); *Daniels v. Quinn*, 801 F.2d 687 (4th Cir. 1986) (statement by teacher that some course materials had not yet been received does not address a matter of public concern). Rather, Scallet was speaking as a concerned citizen, albeit one within the University community, who wished to advance a dialogue at Darden because he thought changes in society demanded that Darden engage in that dialogue.

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[20] The court notes that it is unclear which specific statements Scallet made at faculty meetings allegedly motivated defendants to take the action they did. Scallet does not offer specifics. He simply claims that the defendants objected to his general comments. The court credits this assertion for purposes of the present analysis.

And as discussed above, the fact that Scallet expressed his concerns about Darden's lack of sensitivity to issues of diversity in private faculty meetings, and not in the public square, does not strip those comments of their inherently public quality. *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 58 L. Ed. 2d 619, 99 S. Ct. 693 (1979); *see also Mumford v. Godfried*, 52 F.3d 756, 761 (8th Cir. 1995) (comments made by probationary faculty member in university's architecture department critical of the department's close relationship with the local architectural business community because, teacher alleged, local architectural business community exerted undue influence over curriculum, related to matter of public concern "even if his speech had been directed only to other members of the [university] faculty").

Thus, the court concludes that the remarks Scallet made at faculty meetings concerning diversity at Darden relate to matters of public concern.

Again, the court must next "decide whether [plaintiff's] exercise of free speech is outweighed by the 'countervailing interest of the state in providing the public service the teacher was hired to provide.'" *Hall*, 31 F.3d at 192 (quoting *Stroman*, 981 F.2d at 156). Scallet, of course, argues that the only interest defendants can assert in stifling his speech at faculty meetings is an improper one -- specifically, to ensure the preservation of "the Darden Way" from encroachment by the progressive onslaught of diversity advocates.

Defendants deny that they wished to muzzle Scallet at faculty meetings, but state that to the effect that they did wish to do so it was because of Scallet's confrontational and argumentative style, not because of the content of his

remarks. This argument addresses whether defendants would have renewed Scallet's contract "but for" his protected speech and does not suggest any counterbalance to Scallet's interest in expression under the present analysis.

Thus, the court concludes that Scallet's advocacy of diversity in faculty meetings is protected under the First Amendment because it relates to matters of public concern and because the defendants offer no competing interest served by stifling that speech.[21]

3. Posted Articles and Cartoons

Defendants do not contest that the various articles and Doonesbury cartoons that Scallet posted on his office door and wall relate to matters of public concern. Rather, defendants argue that Scallet was instructed to remove the items because they were harming the wallpaper and because they created an inaesthetic environment that harmed Darden's recruiting effort since Scallet's office was across the hall from Darden's Admissions' Office. Def. Exh. 37, *Smith Dep.* at 144-146. The court concludes that defendants' aesthetic interest, if legitimate, does not outweigh Scallet's interest in the expression. The court again notes that "when an employee's speech substantially involves matters of public concern . . . the state must make a stronger showing of disruption in order to prevail." *Hall*, 31 F.3d at 195 (citing *Connick*, 461 U.S. at 152); *see also Bieluch v. Sullivan*, 999

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[21] Of course, the fact that Scallet's comments at faculty meetings are protected under the First Amendment does not suggest that other faculty members were required to agree with those comments. Indeed, there is more than enough room for debate with respect to the wisdom of teaching "diversity" in a speech and writing class.

F.2d 666, 671 (2d Cir. 1993) ("If the employee's speech substantially involved matters of public concern, the government must make a stronger showing of interference with operations than occurred in *Connick*"), *cert. denied*, 127 L. Ed. 2d 219, 114 S. Ct. 926 (1994). Defendants' aesthetic argument is simply not up to the task.

In summary, the court holds that Scallet's remarks at faculty meetings, and his placement of articles and cartoons outside his office, are protected forms of expression under the First Amendment but that his classroom speech is not so protected.

D. Applying the Framework: "But For" Causation

Defendants, however, may still prevail on their motion for summary judgment if they can demonstrate that the record is clear that Scallet's protected speech -- that is his comments at faculty meetings and his posting of articles and political cartoons outside his office -- was not the "but for" cause of defendants failure to renew the contract.

The court concludes that there are no genuine issues of material fact with respect to this third prong of the analysis. Rather, it is evident that Scallet's protected speech was not the "but for" cause of his non-renewal.

As stated at the outset, this inquiry is a factual one and involves two steps:

> In the first step, the employee bears the burden of establishing the requisite causation to prove that the protected speech was a motivating factor or played a substantial role in the discharge. *Mt. Healthy City Sch.*

*Dist. Bd. Of Ed. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. at 576, 50 L. Ed. 2d 471 (1977). If the employee is able to prove such, the second step shifts the burden to the employer to put forward evidence that it would have fired the employee even in the absence of the protected speech. *Id.*

*Hall*, 31 F.3d at 193.

Scallet cites two alleged statements to support his contention that his speech was a "motivating" factor in defendants' decision not to renew his contract. First, Scallet maintains that Defendant Smith told him that Scallet was undermining Smith's objectives for the school and that while Smith had been trying to get Scallet fired for two years, now he was actually going to do it. Pl. Exh. Tab 1, *Scallet Dep.* at 222. Furthermore, when Scallet approached Defendant Rosenblum and asked him if Defendant Smith was responsible for the non-renewal, Rosenblum allegedly responded, "yes, you've got most of the story." *Id.* at 381.[22]

However, as discussed above, the First Amendment does not bar defendants from failing to renew Scallet's contract because of his in-class speech. It only prevents the defendants from retaliating against Scallet on account of his advocacy in faculty meetings and because Scallet posted articles and cartoons outside his office. Thus, the court

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[22] While Defendants Smith and Rosenblum deny making these statements to Scallet, the court is ill-equipped to determine the credibility of the witnesses. That is a task properly left to the jury. *Summerlin v. Edgar*, 809 F.2d 1034, 1039 (4th Cir. 1987) ("Credibility of conflicting testimony is not, on a summary judgment motion, an issue to be decided by the trial judge").

concludes that these general comments, to be probative of improper motivation, must relate specifically to Scallet's comments at faculty meetings or to his posting of articles and cartoons outside his office. Recognizing the problems inherent in engaging in such an attribution analysis, the court simply notes that the focus of this litigation has been on Scallet's in-class speech.[23] Thus, the court hesitates to attribute the impetus for the alleged comments to Scallet's remarks at faculty meetings or to his posting of literature outside his office. Nonetheless, for purposes of this threshold analysis, the court will assume that some relatively minor degree of illegal motivation is evidenced by the comments.

With respect to their burden, defendants, as discussed above, have presented an array of evidence to the effect that Scallet's demeanor with his colleagues, bordering in some instances on sexual harassment, together with his disruption of the delivery of the A & C course, created insurmountable problems, effectively forcing the defendants to deny his renewal. Thus, defendants argue that Scallet's speech at faculty meetings and his posting of articles and cartoons outside his office cannot be characterized as the but for cause of his non-renewal.

As a general proposition, the court hesitates to grant summary judgment where motivation is an essential element of the alleged offense. *Jones v. Dodson*, 727 F.2d 1329,

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[23] Indeed, Scallet is unable to provide specific examples of comments made at faculty meetings to which the defendants allegedly objected. Nor does he suggest that anyone other than Defendant Smith, on one isolated occasion, expressed disapproval of the materials Scallet posted outside his office.

1337 (4th Cir. 1984) ("where, as here, the evidence raises genuine issues as to the actual reason for an employee's discharge, that motivational issue must of course be resolved by the trier of fact"). However, the court believes this to be an instance where it is appropriate to enter summary judgment for defendants on causation grounds.

The court reiterates that Scallet's case is narrowed by the court's ruling that his in-class speech is not protected by the First Amendment. Thus, at trial, Scallet would need to prove that the defendants failed to renew his contract on account of his speech at faculty meetings and because of the literature he posted outside his office.

To support this latter contention, Scallet points to the one incident with Defendant Smith in the fall of 1991, several months before the non-renewal, when Smith allegedly told Scallet to remove some items from the wall outside his office. This strikes the court as being, at best, a "scintilla" of evidence of illegal motive on the part of one defendant. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Indeed, this incident has been but a footnote to the general arguments made throughout this litigation. Clearly, this incident standing alone, if credited by a jury, would not be enough to return a verdict for Scallet. *Id.*

Even assessing the incident in light of Scallet's related allegation that defendants retaliated against him in response to his speech at faculty meetings, the court concludes that Scallet cannot demonstrate "but for" causation. The only evidence Scallet musters to support his contention that defendants disapproved of his advocacy at faculty meetings is a statement Scallet attributes to Defendant Harris in May

of 1991 to that effect. Even if credited, this statement, taken together with the incident with Defendant Smith, could not support a verdict for Scallet in light of the compelling and substantial evidence of Scallet's misconduct and inability to work with his colleagues in the A & C department.

Underlying this controversy -- indeed, at the root of it -- is the issue of the proper content of, and method of teaching, the A & C curriculum so as to achieve the course's writing and speech goals. Efforts by Scallet to include divergent diversity and multicultural elements in that curriculum appears to have been at the heart of the disaffections of the other instructors of the A & C classes, though coupled with strong complaints about Scallet's personal interrelations with those instructors. Further, having what it considered to be an integrated overall curriculum in the school, other professors saw this expansion of the A & C curriculum as intruding on their separate coursework and curriculum. As a pedagogical matter, the institution included diversity, for instance, in a course on Business Ethics, where it was believed to fit far better than in a course teaching writing and speech.

Failure by Scallet to observe and follow this institutional determination of which courses should embrace which matters within the particular course curriculum is, as observed above, at the very heart of this dispute. Such determinations are clearly legitimately pedagogical, and so clearly related to the institutional judgments appropriate to such discussions, that failure to appreciate and respond to them by Scallet caused the disruption and dissatisfaction so clearly manifested in the record.

As discussed at length above, the record indicates that Scallet's conduct was disruptive and that the entire A & C

faculty had severe problems working with him. Indeed, some of his conduct bordered on sexual harassment. Although Scallet maintains that these proffered reasons for his non-renewal are pretextual, he simply has not mustered sufficient evidence to demonstrate to a jury that defendants retaliated against him either for his advocacy in faculty meetings or because he posted articles and cartoons outside his office. In light of the wealth of evidence supporting defendants' non-retaliatory motivation for failing to renew Scallet's contract, the court concludes that defendants have carried their burden for summary judgment.

V.

For the foregoing reasons, the court grants defendants' motion for summary judgment. An appropriate Order will this day issue.

ENTERED: James H. Michael, Jr.
United States District Judge
Dated: 18 January, 1996

April 15, 1992

Dear Provost Jackson and Dean Rosenblum:

At your request, we have investigated the institutional climate for woman at the Darden school. We believe there are serious problems at the Darden School that affect not only the environment for women, but also the climate for the entire Darden community. In this letter, we set out our conclusions regarding these problems, and provide our suggestions for their resolution.

**Problems:**

1. *There is a hostile climate at the Darden School and a hostile climate for women.*

   The manifestations of this can be seen throughout the organization. There is a palpable lack of trust between female faculty and male faculty, between male faculty and other male faculty, between the faculty and the administration, between some of the staff and the administration. There does not, however, appear to be a difficulty at the student level. Feelings of "betrayal" are common in the organization, and there is a general disappointment in the management style of the institution. Women at various levels in the Darden School recount convincing (and continuing) episodes of behavior that can only be viewed as hostile and unacceptable.

2. *There has been a failure of process at virtually all levels of administration.*

The University's decision to grant tenure following an appeal alleging sexual harassment should have been followed by a swift, and thorough, investigation of the underlying issues. The Provost's Office, the Dean's Office, and the EEO Office all failed to pursue this. The perception that nothing was being done has greatly contributed to the current mistrust and antagonism pervading the organization. The failure of the Provost's Office, in particular, to address the issue is a notable lapse in the process.

3. *There are no clear channels of dispute resolution. There are no well-defined procedures for dealing with problems and allegations of unacceptable behavior.*

   It is not clear who is responsible for dealing internally with issues related to harassment of faculty members. It is not clear how the University's procedures intersect with those of the Darden School. This has contributed to a sense by some that no one is in charge, and that there is no mechanism short of legal recourse for settling disputes.

4. *There is a lack of clarity as to what is expected of faculty makers at the Darden School and a related subjectivity of evaluation.*

   There is repeated concern over what "Darden" is, and the related importance of "fit" in being successful. This makes it difficult to ascertain the real standards being employed in evaluation, and contributes to feelings of perceived inequities. The secrecy surrounding faculty decision-making (even extending to the meetings themselves), the lack of well defined processes to

distribute executive teaching, and the subjective approach used to evaluate teaching performance all contribute to this problem.

5. *There is failure of leadership in the Darden School.*

   There are widely-held perceptions by the faculty that promises have not been kept; that different people or groups have been told different things; that there is an inability (or an unwillingness) to address the underlying issues that diversity is raising. This has allowed particular problems to escalate to destructive proportions.

6. *There was inadequate preparation for introducing diversity into the Darden School.*

   Too little consideration was given to the impact of diversity on the governance system of the school. The result is a feeling of disenfranchisement by some, and a concern by others that the "Darden" way of proceeding is being lost. Similarly, little consideration was given to the positive benefits arising from differential teaching and decision-making styles introduced by more diverse faculty backgrounds.

**Recommended Actions**:

1. *The current controversy regarding sexual harassment at the Darden School must be resolved.*

   There should be an acknowledgement that women have not always been treated appropriately at the Darden School. We recommend that the Provost invite the

current women faculty to specify their allegations to him and that he be responsible for instituting a process to investigate and resolve any such charges. Once such a process is begun, however, the allegations of past inequities must stop. The current situation of unspecified faculty being continually threatened with potential lawsuits is destructive and cannot be permitted to continue. Similarly, once an allegation is resolved, the matter must be treated as closed by all parties.

2. *Clearly defined procedures must be instituted for dealing with dispute resolution in general and sexual harassment in particular. The "oral tradition" of process at the Darden School must be replaced with well-defined written procedures.*

   Who is responsible for investigating allegations of sexism and sexual harassment, and how such allegations will be handled must be clearly specified. The current system of an Ombudsman, while laudable in principle, is simply not working. The roles of the Dean and the Associate Dean in the process must be clear to everyone. There should be multiple ports of entry for placing a complaint in the process. Once such a system is devised, it must be used in all cases. Allegations regarding inappropriate behavior should be investigated and the complaintant kept informed of the process and the outcome. It must also be made clear to all members of the Darden community what constitutes acceptable behavior and how deviations from that will be handled.

3. *The environment at Darden must be made more open.*

Minutes should be taken at all faculty meetings, including those dealing with personnel issues. Consideration should be given to tape recording meetings where contentious issues are discussed. The current lack of openness leads to a perception of secrecy in decision-making, as well as a lack of accountability for why certain decisions were made.

4. *A process of written, yearly reviews should be introduced for (at least) all junior faculty.*

   There is a need to identify institutional criteria for performance and evaluation. There should be clear objectives and expectations for performance, and these should serve as the basis for evaluation of individual performance.

5. *It should be clearly defined who is responsible for the development of junior faculty.*

   The current ill-defined system of mentors is not working. Junior faculty should not expect that senior faculty are responsible for making them successful, but there should be a consistent oversight process in which junior faculty progress is monitored and counsel given. In many institutions, this is the responsibility of the Associate Dean, and a similar system might be applied to the Darden School. If executive teaching is to be counted in the evaluation of junior faculty, then a structured process should be developed to include junior faculty in executive programs.

6. *The evaluation of teaching should be made less subjective, with a greater role played by student evaluations.*

While peer review should remain an important component of teaching evaluation, greater standardization of the process should be developed. The current system suffers from confusion over who (and how many faculty) will evaluate a class, whether it is the responsibility of the junior faculty member to invite senior faculty members to review their classes, and what (if anything) is done to provide feedback to the instructor. In some schools, a teaching committee is designated to undertake such reviews. It is also common practice to employ more objective numerical measures such as student evaluations.

7. *There should be changes made in the hiring process for senior faculty, and increased effort should be made to attract senior women faculty members.*

Current hiring practices seem to encourage a "back door" process whereby potential senior hires are encouraged to visit for a year, with the understanding that if the "fit" is good a permanent offer will be forthcoming. While the hiring of visiting faculty is not objectionable *per se,* this practice contributes to a perception that objective standards are not applied uniformly, and perpetuates the stereotype that "fit" is the foremost criteria in hiring decisions. Moreover, the inability to attract women candidates at the senior level suggests a need to broaden the recruiting effort. These efforts might include constituting search committees that include emminent faculty from other parts of the

University of Virginia, or even from other schools of management.

8. *There should be greater efforts to increase the visibility of women in the classroom.*

   Students report that few woman appear as outside speakers in the classroom and that case material rarely portrays women as the principal decision-makers. Greater attention should be given to increasing the profile of women in these areas. Increasing the number of women faculty should be a top priority at the Darden School.

9. *Attention should be given to managing the inclusion of diversity at the Darden School.*

   A review of the governance process at Darden should be undertaken to evaluate how well the current system incorporates different faculty perspectives. In many institutions, elected faculty committees provide input to the decision-making process. Outside speakers familiar with the organizational stresses related to greater diversity and successful methods for dealing with them should be invited to address the Darden community. An annual review of progress toward diversity should be undertaken, with the results shared with the Darden community and the Provost's office.

While the problems we outline in this report are serious, the cooperation the committee received from the Darden community, and the seriousness and thoughtfulness which many Darden members brought to this problem, suggest that there is an ability and willingness to deal with these

important issues. It is our belief that sucessfully doing so will only strengthen the Darden school's position as one of the top schools of management.

Respectfully submitted,

Maureen O'Hara, Chairman
Sharon Hosteler
Thomas Keller
Sharon McGavin
Mark Satterthwaite

MO:bg

April 30, 1992

Executive Committee
Darden Student Association
The Darden Graduate School of Business Administration
University of Virginia
Charlottesville, VA

To Members of the DSA Executive Committee:

We the undersigned nominate Cid Scallet to be the first recipient of the Darden Outstanding Faculty Award. Without question, Cid embodies all of the qualities the Executive Committee seeks in honoring an outstanding member of the faculty.

As a teacher in the classroom, Cid is unparalleled in his ability to communicate and instill in students the desire to make learning a fundamental part of their lives. He has an uncanny ability to challenge students to think and learn, not with the threat of a cold call (they don't exist in Cid's classes), but by making his classes an experience not to be missed. One is never quite sure what is going to happen in a Scallet class, but you know that when it's over you're going to walk out thinking, laughing and shaking your head in wonderment about some idea or point of view you'd never thought of before. When it comes to evaluating course work, Cid's critiques of student papers are legendary. Is there another teacher anywhere who writes four pages of comments, all of them cogent and helpful remarks, for a two-page paper? Certainly no teacher at Darden comes close to providing such insights on exams or other work assigned for a course.

One of the main reasons most of us chose to come to Darden is the open-door policy and accessibility of the faculty. Not only is Cid's door always open, but he's always in. The biggest problem students face in talking to Cid is the line of students that usually stretches out past Jon Megibow's office. Students don't just come to Cid to talk about A&C, they come to talk to him about every problem, no matter how large or small, they may have at Darden. Most of all, they come to him just to shoot the breeze, have a few laughs, maybe commiserate a bit, and go home feeling better. While less than half of the students in any one class are fortunate to have had Cid as a teacher, perhaps as many as three-quarters of the students in each class have stopped by Cid's office to ask for help preparing a resume or for assistance on classwork for anything from marketing to organizational behavior. Cid always obliges.

The most important contribution, however, that Cid makes to Darden is what he does to foster better relations and a stronger sense of community at Darden. There are those who may think of Cid as some kind of rabble rouser - the "anti-Darden" if you will. Nothing could be further from the truth. In fact, Cid may very well be the glue that holds Darden together. Darden has changed over the past half dozen or so years -- there is far more diversity than there once was, more women, more minorities, more foreign students and more diversity in the kinds of backgrounds and skills that students bring to Darden. These necessary changes, reflections of a changing workplace that we will all soon enter once again, have occurred not without some stress and strain to the Darden community. For many of those who have, at times, endured more than their share of turmoil, Cid has been a source of comfort, understanding and patient advice. Whether it's helping Japanese students to cope with language

and cultural problems or women with the overwhelming male culture that dominates Darden, it is Cid to whom many, if not most, first turn for help.

Unfortunately, for all that Cid does for Darden, in his sometimes quiet, but usually outlandish ways, he has never received the recognition he so richly deserves. The DSA Executive Committee has it in its power to right this wrong by awarding Cid with the Darden Outstanding Faculty Award. No one is more highly deserving, and no one would appreciate being honored by those he serves more than Cid Scallet.

Sincerely,

[Signed by 125 persons]

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

| | | |
|---|---|---|
| Robert J. Scallet, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| | ) | |
| v. | ) | Civil Action No. 94-0016-C |
| | ) | |
| John R. Rosenblum, | ) | |
| et al., | ) | |
| | ) | |
| Defendants. | ) | |

AFFIDAVIT OF ALAN BECKENSTEIN

Alan Beckenstein, having been duly sworn, hereby deposes and says:

1. I am a tenured full professor at the Darden Graduate School of Business Administration, University of Virginia, Charlottesville, VA. I have been at Darden since 1972.

2. From Fall, 1988 through the Spring of 1992, I was Chair of the First Year Committee at Darden. The First Year Committee was the body appointed by the Dean to operate the required first year curriculum. Analysis and Communication ("A & C"), as a required first year course, was primarily the responsibility of that committee.

3. During that time, I worked extensively with Mr. Scallet. Of the ten course heads with whom I worked, Mr. Scallet was one of the most helpful and valuable. He was

always willing to collaborate in finding solutions to difficult problems that the Committee faced; he was always supportive of my position as Chairman; he had an ability to understand the interactions between the other members of the Committee; he was generous with his time; and behind the scenes he spent countless hours in collaborating on curriculum design and scheduling matters that were very complex. I could not think of a better team player.

4. I was in countless meetings with Mr. Scallet and I never witnessed him lose his temper. Mr. Scallet was continually seeking improvement in the program and frequently took provocative positions in order to stimulate discussion. Occasionally this produced defensive reactions from other people at the meeting who did not understand or agree with his views. However, I never witnessed a personal or ad hominem attack, and his views often produced his desired result -- a more energetic and thoughtful discussion of the issues.

5. I also worked closely with Mr. Scallet on a number of program events that involved joint activities between A & C and my course. He was as good a colleague as I have had in my 23 years at the school.

6. During Spring, 1992, as the Committee planned for the next year, he was asked by his colleagues to plan and implement several new multi-course program events. A number of his colleagues readily volunteered to work with Mr. Scallet on these projects.

7. As Chair of the First Year Committee, I frequently discussed the operation of the A & C course with Mr. Scallet. There were student complaints about the quality of

teaching and professional practices of some of the A & C instructors -- not Mr. Scallet -- particularly their willingness to commit the time to the job. When I discussed these matters with Mr. Scallet, he would invariably remind me of the limited commitment the school had made to these people in terms of salary, benefits and job security, and was generally protective of them. He often stated that he wished the school would make more of a commitment to the A & C course and those teaching in it -- his frustration was not with the instructors as persons, it was with the structure of their positions. On the contrary, he was clearly sympathetic to their personal situation -- certainly I never heard him say anything about the others in A & c that I would regard as outside the general standards of collegiality at Darden.

8. After the termination, Mr. Harris came to my office to talk to me about the decision. He explained to me that they had to take the action because Mr. Scallet was "out of control." He added that he had spoken to a University psychiatrist and described some of Mr. Scallet's behaviors and that the psychiatrist had told him that these behaviors were consistent with someone who needed psychiatric help. He further suggested that he was thinking of calling Mrs. Scallet to recommend to her that Mr. Scallet get therapy.

Respectfully submitted,

Alan Beckenstein

UNITED STATES DISTRICT COURT
FOR THE WESTERN-DISTRICT OF VIRGINIA

| | | |
|---|---|---|
| Robert J. Scallet, Plaintiff, | ) | |
| v. | ) | Civil Action No. 94-0016-C |
| John R. Rosenblum, et al., Defendants. | ) | |

AFFIDAVIT OF JON MEGIBOW

Jon Megibow, having been duly sworn, hereby deposes and says:

1. I am Director of Admissions and a member of the General Faulty at the Darden Graduate School of Business Management.

2. I first met Mr. Scallet seven or eight years before we worked together at Darden. I was an Assistant Dean in the College of Arts and Sciences. A student whose academic progress I was assigned to oversee, was experiencing significant personal problems which were reported to me. Mr. Scallet worked extensively with her -- my first experience with his extraordinary degree of commitment and caring for students.

3. When Mr. Scallet became course head of A & C, he moved to an office across the hall from me. I was struck by the parade of students who came to Mr. Scallet for help of

all kinds. The year before I taught in A & C, I decided to prepare myself by sitting in on Mr. Scallet's classes because I had heard from students that he was an extraordinary teacher.

4. I was struck by his excellence in the classroom. He was challenging and charismatic, sometimes funny, and, on occasion, provocative. During my tenure at Darden, I have been struck by the remarkable quality of the teaching at Darden -- for Mr. Scallet to be generally recognized as one of the best teachers at Darden is, in my opinion, a high honor. Indeed, for Mr. Scallet to have been recognized by the students as such an outstanding teacher is particularly noteworthy given the general lack of regard for the A & C course.

5. As Director of Admissions in 1988-1992, I supervised a staff of eight women and one man. Mr. Scallet is outgoing, social, and engaging. He had frequent interactions with all members of my staff, five of whom are still at Darden. They shared, and share, my high regard for Mr. Scallet. On a regular basis, he expressed interest in their professional and personal lives and seemed more sympathetic to them as staff members at Darden than other faculty.

7. During the time Mr. Scallet was at Darden, he did not have a reputation for being abusive to women or having serious character defects or significant behavioral problems.

8. I was asked to become course head of A & C after Mr. Scallet was terminated. It was my understanding that Mr. Harris asked me, in part, because no one in A & C

had the necessary credibility with the rest of the faculty. I went to see Mr. Harris because, on occasion, students had expressed frustration about the unavailability of some of the part-time A & C instructors. Mr. Harris said that he thought the problem with A & C was largely structural, but I said that I was concerned about the ability of the instructors to deliver the course and that I would not take the job unless I had the power to replace those who did not perform. Mr. Harris understood my questions about the competence of these instructors and promised that I would have that authority.

9. I held several meetings with the A & C instructors during the summer of 1992 to try to reach consensus on various issues. After discussion I decided to switch one or two speech classes to the writing side of the course. Shortly thereafter, I was told by Mr. Harris that John Howard, without consulting me, had gone to Ray Smith to complain about this decision. I felt that it was unprofessional for Mr. Howard to go behind my back to Mr. Smith, whose responsibilities as Associate Dean did not include A & C, and told him that, if he did it again, I would fire him.

10. During the first year that I was course head, I made a concerted effort to learn whether the problems in A & C were structural or instructional. I concluded that they were both. In the case of some of the instructors, there was a clear lack of commitment to the course and their jobs, at least in part because of the part-time nature of their positions. Others were contentious and had no sense of reasonable faculty behavior -they were unable to put the course ahead of their private agendas or to work as members of the team.

11. At the end of the 1993-1994 school year, I went to see James Freeland, who had succeeded Mr. Harris as Associate Dean of Faculty. Mr. Freeland wanted to improve A & C, and I said that replacing some of the instructors with more committed and capable people would be important to achieving that goal. Mr. Freeland said that some of them had been at Darden a long time and that loyalty had its value, and that, if I were committed to replacing them, I would have to carefully document their failure to perform.

Respectfully submitted,

Jon Megibow

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

Robert J. Scallet,

Plaintiff

v. Civil Action No. 94-0016-C

John R. Rosenblum, et. al.,

Defendants.

**REPORT OF PETER 0. STEINER**

November 29,1995

I have been retained by plaintiff to discuss, in the context of this case, the prevailing standards of academic administration as they relate to the following issues:

1. Academic freedom: its importance in a university -- to the university itself, to its students, and to the individual teacher -- and how allegations that a teacher has been disciplined, discharged, non-renewed or suspended in violation of the principles of academic freedom should be evaluated;

2. Misconduct, including sexual harassment, by a faculty member: its importance in a university community and how it is appropriate for an institution to investigate and respond to the allegation that a teacher ought to be disciplined, discharged, non-renewed or suspended for sexual harassment or other misconduct;

3. Whether in administrative hearings on grievances or appeals it is realistic to expect that the nature of the testimony offered can be kept confidential and thus avoid the possibility of damage to the reputation and future career of parties involved.

My compensation for participation in this case is to be at my usual consulting fee of $350 per hour, plus out of pocket expenses. I have, however, agreed to place a cap of $5,000 on billing of my time in preparing this report.

## MY QUALIFICATIONS

My curriculum vitae is attached as Exhibit 1.

I have spent the last 49 years in the academic community: from 1946-1949 as a graduate student and Teaching Fellow at Harvard University; from 1949-1957 as Lecturer, Instructor, and Assistant Professor at the University of California, Berkeley; from 1957-1968 as Associate Professor and Professor at the University of Wisconsin, Madison; from 1968 to the present as Professor and Professor Emeritus at the University of Michigan, Ann Arbor.

In addition to normal teaching, research and service activities I have held concurrent administrative appointments while at the University of Michigan as Chairman of the Department of Economics, from 1971 to 1974, and as Dean of the College of Literature, Science, and the Arts, from 1981 to 1989.

Among relevant concurrent outside activities is my association with and service to the American Association of

University Professors (AAUP). I served as President of AAUP from 1976 to 1978, and as a member of its Committee A (Academic Freedom and Tenure) both before and after my term as president. I have chaired two investigating committees appointed by AAUP dealing with alleged violations of academic freedom. Reports on these investigations were published in AAUP's journal, *Academe* in May, 1979 (concerning the University of Maryland) and in March-April, 1995 (concerning Bennington College).

In the course of these years as faculty member, as university administrator, and as active participant in AAUP's role as formulator and monitor of sound university practices, I believe I have acquired some expertise in matters relevant to this litigation. I have personally been involved in the hiring, renewal or non-renewal of many dozens of faculty members both on and off the tenure track, and I have had the responsibility for evaluating many cases in which I performance or misconduct has been alleged.

I have not been deposed nor testified as an expert at trial within the last four years.

**MATERIALS CONSULTED AND RELIED UPON**

I have attached as Exhibit 11 a list of the materials directly related to this case that I have examined and relied upon in preparing this report. In addition, I am familiar with, and rely to a degree upon, the large group of Policy Documents and Reports ("The Red Book") issued by AAUP, long and widely considered the authoritative voice of the academic community in developing standards for sound academic administrative practice in higher education.

## PRELIMINARY CONSIDERATIONS: THE CONTEXT

### Type of Non-renewal

This case concerns non-renewal, terminal notice, and reassignment of a teacher from his position at the Darden School in the University of Virginia. There are different kinds of non-renewal of faculty appointments:

a. routine non-renewal for those with temporary appointments;

b. non-renewal compelled by financial exigency or by program reduction or discontinuance;

c. non-renewal for alleged cause, either inadequate performance or misconduct.

Mr. Scallet's non-renewal unambiguously falls into category c.

Different standards and procedures apply in the three situations. Type c. non-renewals become dismissals, and potentially damage the reputation and future career opportunities of the person dismissed. For this reason, if for no other, it is standard practice within the academic community that when inadequate performance is the reason for non-renewal, the faculty member must be given the right to present evidence that may rebut the alleged inadequate performance. It is then necessary to have the competing assertions carefully evaluated. If misconduct is alleged, the potential damage to the teacher's reputation and career compels an even more thorough investigation. The teacher must be given the right to a full hearing before the renewal

decision is made at which he is given the opportunity to respond, before independent persons, to the allegations . The teacher is entitled to have the issues resolved, or the right to have the charges dismissed and eliminated from his record.

**Reassignment as Suspension**

A terminal appointment after notice of non-renewal becomes *de facto* suspension if the teacher is removed from his normal duties. In particular removal of a teacher from the classroom, or from access to students amounts to suspension. Similarly removal from an office on campus can be a form of suspension. Either of these is a highly unusual and demeaning step, and therefore only justified in cases of serious misconduct. Each would be regarded as a red flag by another institution considering hiring the faculty member.

It appears that Mr. Scallet, (whose performance in the classroom was excellent by all accounts, and was not offered as among the reasons given by defendants for his non-renewal) was removed from the classroom during his terminal year and was, therefore, suspended. Moreover, by virtue of being required to vacate his office by July 10th of his terminal year, before the effective onset of the academic year, he was deprived of normal contact with students and faculty colleagues. Such suspension inevitably raises questions about the teacher that may well become career damaging.

**Reasons for Non-renewal and/or Suspension**

There are many different reasons mentioned in the documents I have reviewed to account for the non-renewal of Mr. Scallet. I have in what follows attempted to paraphrase

and classify ten of them in ways that are subject to evaluation:

Group A: Violations of Academic Freedom

1. Mr. Scallet's curricular views, and the content of the course he designed and presented were disapproved by some faculty members and influential administrators, and led them to attempts to change the course content, and ultimately to demand that he be discharged.

2. Disapproval of his contact and rapport with students who were critical of aspects of the Darden School's administration.

3. Disapproval of his views with respect to diversity at the Darden School and how it should be approached by the School's administration.

This group of three reasons, essentially those asserted by Mr. Scallet in his grievance, amount to the allegation that his academic freedom was violated and that therefore-his non-renewal and suspension were improper.

Group B: Inadequate Performance

4. Failures of Mr. Scallet in managing the A&C course for which he was allegedly responsible.

5. General lack of collegiality with colleagues in and out of the course that prevented effective delivery of the course.

6. "Undermining the mission of the Darden School." I do not know what this means. Unless or until it is made more specific, it is impossible to evaluate, and appears to be a makeweight.

This group of three reasons, essentially the ones told to Mr. Scallet at the meeting on May 26, 1992 when he was given his terminal notice and reassigned in such a way that he was suspended from his teaching duties, amount to charges of inadequate performance.

Group C: Misconduct or Personality Disorders

7. Confrontational and threatening behavior toward colleagues.

8. Abusive behavior that engendered fear particularly on the part of women.

9. A destructive personality and possible mental instability.

10. Behavior amounting to sexual harassment of women.

This group of four reasons, each of which emerges in the so-called mediation report of Professor Hallahan, amount to charges of personality disorders or misconduct.

Which of these groups of reasons, or what combination of them actually led to Mr. Scallet's non-renewal and suspension is a factual matter, and determining the relevant facts is of central importance. I am neither asked to, nor presently in a position to, answer the factual questions. But I

can address how a responsible academic administrator, acting within the standards of the academic community, whether as a dean or as an adjudicator, might be expected to address this task so as to give it the attention it requires with due regard to the interests of the institution, its students, and the rights of the faculty member.

## THE ISSUES

### Academic Freedom

The following excerpt is from the *1940 Statement of Principles of Academic Freedom and Tenure,* a statement adopted jointly by the AAUP and the Association of American Colleges, and endorsed by over one hundred academic societies.

> Institutions of higher education are conducted for the common good, and not to further the interests of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.
>
> Academic freedom is essential to these purposes and applies to both teaching and research... Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning.
>
> Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of

the institution should be clearly stated in writing at the time of the appointment.

The need for open examination of issues, especially of controversial ones, is the life blood of inquiry, and of learning. Academic freedom and its protection is thus essential to the *institution* as well as to the protection of the individual's constitutional rights. Sanctions, including non-renewal and suspension from the classroom, imposed on a teacher in response to his exercise of academic freedom are unacceptable. Claims that such sanctions have been imposed demand the most serious attention, not the mere assertion that such considerations were not a part of the motives behind the sanctions.

I believe that I have some expertise in these matters as a result of the combination of my academic administrative experience and my involvement in AAUP's investigations and evaluations of alleged violations of academic freedom at academic institutions in the United States.

How can such claims be tested? It is unlikely that an administration will claim or admit that the reason for sanctions imposed upon a teacher are because of his exercise of constitutional and traditional academic rights; instead it is likely to find other reasons, more nearly acceptable, as pretexts for its actions even though the underlying motivation may be the silencing of views with which the administration is not in sympathy.

The evaluation process must involve a two part inquiry. First, it must determine if there are episodes or events that make the claim of violation of academic freedom other than frivolous. If so, second, it must determine if the stated

reasons for the sanctions imposed, are less than fully credible. This inevitably requires a careful examination and then the responsible exercise of judgement by whoever is the finder of fact.

The claims made by Mr. Scallet identify a number of episodes or events. Among these are:

(1) Disapproval expressed by some influential faculty and administrators of the political or ideological content of his courses, even though the content of those courses had been approved by the relevant committees and faculties.

(2) Changes in the course content imposed by administrators, outside of the usual avenues for curriculum review and approval, that had the effect of removing controversial but relevant material.

(3) Threats to the teacher that he might be penalized or even dismissed as a result of his including in his course material that was deemed political, or radical.

(4) Warnings to the teacher that his advocacy of students' positions on controversial matters was inappropriate and unacceptable.

(5) The teacher being instructed to remove from the vicinity of his office cartoons and articles, placed there for student perusal, because of their political or ideological content.

(6) Conditioning funding for course development to only a subset of topics proposed by the teacher, the subset reflecting the preferences of the administrator.

(7) Removal of a teacher from the classroom and from physical proximity to students in order to insulate them from his adverse influence on their views.

(8) Suggestions to the teacher that, in his role of faculty advisor to the student newspaper, he is expected to use his influence to prevent expression of students' views that the administration finds uncomfortable.

If even a few of these claims made by Mr. Scallet constitute any part of the motivation for his non-renewal or suspension, they would point to an infringement of academic freedom. If they occurred, mere assertion that they played no role in Mr. Scallet's non-renewal and suspension is unpersuasive. The necessary next step, acting within the standards of the academic community, is a searching examination of proposed alternative reasons for the non-renewal and suspension.

**Evaluating Charges of Inadequate Performance**

As a preliminary observation, I find the specific allegations, described as Group B, above, to be vague and evanescent. The managerial failures are hard to evaluate without knowing what Mr. Scallet's authority was, and how more precisely he failed properly to exercise it. A general lack of collegiality of a faculty member is hardly a disqualifying attribute of membership in a faculty; if it were a great many faculty members at every institution that I know about would no longer be employed. Academic life seems to attract more than its share of dedicated but uncollegial people, and "prima donnas" abound. And the vague "undermining the mission . ." charge could cover almost anything.

Dismissing an apparently successful and popular teacher, or removing him from the classroom, are not steps that a Dean would ever take lightly. Extraordinary teachers (as distinct from merely competent teachers) are a rare breed and they are both sought and cherished. One of the most difficult dilemmas for a dean or department chair in a research-oriented university is the case of an excellent teacher who is found to be deficient in research output or scholarly potential. It is to deal with this problem that a number of teaching functions, where there is not an expectation of correlative research, are filled by non-tenure track appointments of the sort apparently utilized at the Darden School for A&C instruction. (At Michigan we use such appointments for, among others, a good deal of elementary language instruction, and for teaching remedial English composition.)

In order to evaluate claims of inadequate performance by an extraordinary teacher, in an appointment where teaching is a major part of what is expected of him, it is appropriate for an administrator, acting within the standards of the academic community, at the time a decision is being made about non-renewal, to ask the following kinds of questions:

(1) What has been the total performance of the individual in his teaching, his administrative responsibilities, and his other required and volunteered activities? Evaluation should be sought from his students, colleagues in his courses, his supervisors, as well as from supervisors and colleagues in each of the other university activities in which he has participated. A broad range of evaluation gives the best chance of reaching a balanced and unbiased picture.

(2) What has been the level of satisfaction with the course or courses for which he is responsible? Has the course content been reviewed and approved by his supervisors, and by whoever is responsible for curriculum design? Has it achieved or failed to achieve the objectives for it? If it has fallen short, has the fault been that of the person's performance? If so, has he been given constructive criticism and an opportunity to correct the shortcomings but then refused or been unable to do so?

(3) If there are specific complaints, has the individual been told of them, and then been given an opportunity to respond and attempt to rebut the complaints? Have both the complaints and his responses been investigated and either found valid or dismissed? Are complaints isolated incidents, repeated complaints from a well defined and limited number of people, or are they widespread, frequent and pervasive? Additionally, one should be sensitive to the possibility that the complainers have private agendas or personal quarrels that motivate them.

(4) If valid complaints center on some aspects of performance, but not on all (e.g. administrative style but not teaching) is some less drastic remedy than nonrenewal and suspension available and appropriate, such as offering the person a revised and restructured appointment that will retain him in what he does well?

These particular questions are intended to be merely suggestive, but the answers to them, or to some like them, would be expected by an administrator acting within the standards of the academic community. If such steps are taken one would expect a substantial file to build up, reflecting the results of such an investigation. If such steps

are not taken -- if a full investigation is not conducted by an administration or an evaluator before making a non-renewal decision -- it raises the suspicion that the charge of "inadequate performance" is a pretext rather than the reason for so final a solution as non-renewal and suspension.

In addition to looking at what kind of evaluation was done, it is appropriate to be alert to unexplained actions. Specifically, I am struck in this case by anomalies in the timing of certain actions which do not seem consistent with a decision process that complies with prevailing standards of the academic community:

(1) Why was Mr. Scallet notified of his reappointment in what appears to have been normal fashion in May of 1992, and then, within weeks, summoned to a meeting with three deans at which he was formally notified of his non-renewal and reassignment? What event or events triggered what appears to be an abrupt change of course on the part of the administration?

(2) Since Mr. Scallet appears to have been stripped of his administrative duties a year before his notice of non-renewal, what role did his alleged administrative shortcomings have in the ultimate decision?

(3) What event or events triggered the deans' calling of a special meeting of the A&C staff, (excepting only Mr. Scallet) in May of 1992, to solicit and hear complaints about his behavior toward those colleagues?

**Evaluating Charges of Misconduct.**

*[I shall focus here on charges of misconduct, including but not limited to sexual harassment, by a male faculty member against women, which appears to play an important role in this case, but most of the comments apply more generally to other forms of alleged misconduct as well.]*

Again let me begin with a preliminary observation. I am struck by the abrupt shift in the reasons for non-renewal given to Mr. Scallet at the meeting on May 26, 1992, (Group B, above) and those reported as given to Professor Hallahan the mediator appointed after Mr. Scallet filed his grievance (Group C). The latter focus not on inadequate performance, but on misconduct or serious personality faults. This shift is, in itself, puzzling and disturbing.

Certain allegations, by either side in a dispute over non-renewal, compel especially serious and sensitive treatment in an academic setting. Charges of sexual harassment, or other misconduct by a male faculty member against females are extremely serious to both parties *and to the University itself.* The University must create and maintain an environment in which such behavior is not tolerated. Every complainant has the right to have such charges seriously considered, adjudicated, and if proved, acted upon. The person complained against has the right to have the charges formally made and to be given a full and prompt opportunity to reply to them. If the charges are not deemed merely frivolous, it is essential to have a hearing and other appropriate fact-finding under the appropriate procedures of the institution. If the charges are found not to be justified the faculty member has the right to have them dismissed and his reputation exonerated. If the charges are not formally made, or are not

investigated and found to have substance, it is virtually self evident that no adverse employment action should be based upon them, in whole or in part.

Concerns about misconduct are present in many arenas and institutions of our society but colleges and universities have become particularly sensitive to the problem of sexual harassment because of the presence of many young, female, students and junior faculty who are in positions where they may be harassed by persons who have, or are perceived to have, coercive powers over them.

A university is, in a moral if not legal sense, responsible for the students entrusted to it, and it faces serious jeopardy if it fails to ensure an environment that discourages and punishes sexual harassment or other misconduct. Thus *every* complaint must initially be taken seriously and investigated to the point where it either triggers a full investigation, or is dismissed as not serious, not proven, or not valid. Universities in recent years have gone to great lengths to codify procedures for dealing with such complaints and making it easy for complainants to make formal charges. If a complainant refuses to make the charge in a sufficiently formal way to permit it to be subject to the appropriate procedures, or if the charges are investigated and found not to be valid, it is essential that these facts be as much a part of the file as the fact of a complaint having been made.

From the point of view of the person complained about, resolution or dismissal of every such claim is of vital concern. Dismissal, non-renewal, suspension, or even lesser sanctions imposed on a faculty member for this sort of misconduct are critically damaging to his reputation and career prospects. One never hires a faculty member who has

been discontinued elsewhere without a full and detailed, formal and informal, inquiry into why he was discontinued. One asks the candidate, of course, and reads letters of recommendation, but more searching, informal inquiries are usually made via persons at the former institution, usually by a series of phone calls to persons one knows well enough to be given candid answers.

Not all such inquiries are damaging. Professional reasons -- e.g. too few publications, a book judged not good enough or sufficiently original -- are seldom disqualifying, for not only can professional judgements differ, but different institutions may have different expectations. (At the University of Michigan, for example, we regularly hire faculty members who have not been granted tenure at Harvard or Stanford, and are usually satisfied to have done so.). But allegations of misconduct, or of major personality problems are inevitably chilling, and virtually always disqualify a job applicant. This may well be unfair, but it is the case: it reflects the prudent administrators policy of "When it doubt, don't". Persons who have been discharged after being charged with misconduct of any kind, or even for mental illness, are almost never able to continue in academic life.

Misconduct charges arise through specific complaints. A university should not fail to investigate every such complaint, but neither should it take assertion as fact. Increasingly in the past decade universities have developed detailed programs for reporting and evaluating claims of misconduct by faculty members, and responsible administrators are scrupulous in abiding by them. Where a complainant refuses to make a formal charge, or where a charge is made but after investigation dismissed, it should

not, of course, be later held to be in the faculty members record as evidence of improper behavior. In the face of charges of misconduct, careful investigation with due regard to process, not causal attention, is essential to protect the rights and reputation of each of the individuals and of the institution.

In the record of this case that I have reviewed there are some complaints of alleged misconduct that were at various times said to have played a role in Mr. Scallet's non-renewal and suspension. In each case it is proper to ask whether the complaints were formally made, whether Mr. Scallet was given the opportunity to reply and attempt to rebut, and whether in each case (unless the complaint was dismissed as insignificant or frivolous) the complaint was carefully investigated and resolved. (Here too there is a timing anomaly. Why were complaints about Mr. Scallet's behavior toward female colleagues that had been received, and presumably dealt with, a year of more earlier suddenly revived, and given a prominent role in the reasons alleged for his non-renewal and suspension?)

With respect to each allegation of misconduct it is appropriate also to ask whether the facts developed in the investigation, and the conclusions reached, were communicated to the parties, and recorded in the appropriate personnel files.

If the answers to these questions are negative, reliance on these incidents to justify non-renewal and suspension would, acting within the standards of the academic community, be inappropriate, indeed outrageous, and suspiciously pretextual. To the possible argument that, "Where there is smoke, there is fire", the correct response is,

"No, where there is smoke, there is only smoke until fire is discovered."

**Evaluating Claims of Personality Defects, Mental Instability, Etc.**

Here too a preliminary observation. I find it difficult to identify just what is being asserted about Mr. Scallet's mental or personality defects.

While it is easy to make assertions of mental or personality defects about a person with whom one disagrees, such assertions are both difficult to prove, and difficult to rebut. For this reason a high threshold of skepticism is required, and it usually requires careful clinical and medical examination before such allegations are given credence. Acceptance of uninvestigated charges, rumors, and hearsay are antithetical to responsible administration, and potentially defamatory. This is particularly the case with someone whose employment is being discontinued, because even the hint that the person is a potential source of these kinds of trouble will suffice to prevent his being offered appointment elsewhere.

It should go without saying that it would be a serious breach of the prevailing standards in the academic community for an administrator to legitimize such claims as facts without having made a careful investigation.

**The Confidentiality of the Hallahan Mediation Report**

Many of the things reported by Professor Hallahan as said to him by defendants in this case amount to very serious

charges of misconduct by Mr. Scallet, and of personality defects. I offer three observations on this matter.

While, in order to elicit full and candid testimony, it is desirable to be able to offer confidentiality to those who are asked to give testimony in administrative proceedings, it is today impossible to assure confidentiality, either with respect to the content of the testimony or to the identity of the testifier. A combination of unwarranted but unavoidable leaks, the possibilities of compelled disclosure under freedom of information statutes, and of discovery that is ordered in litigation, make it the reality that both what is said, and by whom, will eventually be disclosed, both to all parties involved and also more generally.

Whether or not this is regrettable, it is true. (At the University of Michigan we now warn people of this and advise them that they must be prepared to defend what they say both for their own protection and to avoid damage to the reputation of others.) This limits to some extent full and candid testimony, and thus increases the burden on the investigators.

The second observation is that although testimony given in administrative hearings and proceedings is not under oath, and thus not subject to the legal sanctions of perjury, testimony discovered to be dishonest, or malicious is regarded as a form of misconduct inconsistent with faculty status, and is itself subject to investigation and appropriate sanctions. One can not lie with impunity.

The third observation is that a similar standard of honesty in testimony does not apply to letters of recommendation. The consequence of a characteristic

substitution of hyperbole for candor in letters of recommendation is that reliance in hiring is placed on a different, less formal, undocumented method of communication the phone call to colleagues known and trusted -- where candor is possible and confidentiality is protected. Adverse information of any kind inevitably becomes known, and a subsequent negative decision not to offer employment is not subject to review. The effect of this on the career prospects of dismissal of a faculty member is apparent.

Peter 0. Steiner
November 29,1995

Subscribed and sworn before me, this 29th
day of November 1995, a Notary Public
in and for Jackson County Michigan.

NOTARY PUBLIC
My Commission expires 02-07-96

EXHIBIT I

PETER O. STEINER
*Curriculum Vitae*

502 Heritage Drive
Ann Arbor, Michigan 48105
Phone: 313-665-6378

Personal:

Born: July 9, 1922, New York, New York
Married to Patricia Owen Steiner
Grown children

Education:

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|---|---|
| Oberlin College | A.B. (Magna Cum Laude), 1943 |
| Harvard University | M.A. Economics, 1949 |
| Harvard University | Ph.D. Economics, 1950 |

Honors:

Phi Beta Kappa (honorary)
Order of the Coif (honorary)

Employment:

| | |
|---|---|
| 1944-1946 | United States Naval Reserve |
| 1947-1949 | Harvard University, Teaching Fellow in Economics, |
| 1949-1957 | University of California, Berkeley, Lecturer, Instructor, Assistant Professor, Economics |

| | |
|---|---|
| 1957-1968 | University of Wisconsin:<br>Associate Professor of Economics 1957-59<br>Professor of Economics, 1959-68 |
| 1968- | University of Michigan:<br>Professor of Economics 1968-1991<br>Professor of Law 1968-1991<br>Dean, College of Literature, Science, and the Arts, 1981-1989<br>Dean Emeritus, 1989-<br>Professor Emeritus, 1991- |

Fellowships:

| | |
|---|---|
| 1956 | Social Science Research Council, Faculty Research Fellow |
| 1960 | Guggenheim Fellow |
| 1965 | Ford Faculty Research Fellow |

Ancillary Appointments:

Presidential Task Force on Productivity and Competition (1968)
Higher Education Advisory Committee on Wages and Prices (1969)
Chairman, Department of Economics, University of Michigan (1971-74)
Visiting Professor of Economics, University of Nairobi, Kenya (1974-75)
Research Advisory Board, Committee on Economic Development (1974-78, 86-89); Chairman (1977-78)
President, American Association of University Professors (1976-78)
President, Midwest Economics Association (1983-84)

**EXHIBIT II**

**Materials received and reviewed by Peter 0. Steiner in Scallet case**

Complaint

Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss.

Plaintiff's Supplemental Memorandum in Opposition to Defendant's Motion to Dismiss.

Plaintiff's Response to Defendant's First Set of Interrogatories.

Faculty and University Relations, Policies and Procedures.

Report of the Committee on the Status of Women at Darden, and Dean's reply, May 1992.

Edward Scallet letter to Provost Jackson, July 6, 1992.

Hallahan Grievance Report, Jan 4, 1993.

Buckman Report to Provost Jackson on Scallet Grievance, March 25, 1993.

Edward Scallet letter to President Casteen, June 7, 1993.

Hutchinson Grievance Report, May 31, 1994.

Depositions of:

Robert J. Scallet, September 21-22, 1995 including Exhibits 5-10,12-34, 36-40.

John R. Rosenblum, September 26 and October 30. 1995, including no exhibits.

Robert J. Harris, September 27, 1995, including Exhibits 19, 22-28, 30-34.

Clyde Ray Smith, September 28, 1995, including Exhibits 35-39, 41.

Virginia Germino, October 25, 1995, including no exhibits.

Eliza Bauer Scallet, October 26, 1995, including no exhibits.

Paula M. Wenger, October 31, 1995, including no exhibits.

MEMORANDUM

TO: John Rosenblum

FROM: Melissa H. Birch

DATE: March 27, 1992

This is to confirm our conversation of Wednesday (March 25) afternoon.

Within the last week I have become aware of two situations that concern me greatly. In the first case, a female student reported to me that her A&C instructor, Mr. Cid Scallet, took off his shoes in class, stood on the table, and shouted obscenities. The student was upset by the behavior, disliked the experience and thought it a waste of her time and money. In the second case, a female working in the building disclosed to me that she has been subjected to repeated and graphic descriptions of Mr. Scallet's sex life by Mr. Scallet himself. Neither woman would file an official complaint with your office or EEOC. Both women fear reprisals from either the School or Mr. Scallet (or other members of the faculty in the case of the student).

I understand that you acknowledge the seriousness of this problem and threat it poses to women working or studying in this building. I also understand that you wish to discuss this matter with Mr. Harris and that subsequently the Dean's Office will take appropriate action.

As per our conversation, I will check back with you upon my return from Mexico City on April 6, 1992.

TO: *Melissa Birch*

FROM: *John Rosenblum*

DATE: *April 24, 1992*

I am sorry we have missed each other this week. I was trying to follow-up our conversation of Tuesday, April 7. Bob Harris and I are committed to addressing your complaint. Could you provide us with the day and class in which the alleged behavior took place?

JWR/dlf

MEMORANDUM

TO: John Rosenblum, Dean

FROM: Melissa H. Birch

DATE: May 1, 1992

With regard to your memorandum of April 24, 1992, 1 wish to be clear that I have filed no complaint with your office and have not made any allegations. I did, an March 25, repeat to you information which had been told to me. I have not been told anything further by these individuals.